CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 228.

THE UNITED STATES, PETITIONER,

vs.

EMIL DIECKERHOFF, ADOLPH ERBSLOB, RUDOLPH ERBSLOB, AND LUDWIG DEUSS, COMPOSING THE FIRM OF DIECKERHOFF, RAFFLOER & CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 13, 1905.
CERTIORARI AND RETURN FILED MAY 1, 1905.

(19710)

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a United States Circuit Court of Appeals for the Second Circuit.

EMIL DIECKERHOFF ET AL., plaintiffs in error (defendants below),
vs.
THE UNITED STATES, DEFENDANT in error (plaintiff below).

Transcript of Record—Error to the Circuit Court of the United States for the Southern District of New York.

53978. F. 5575—1900.
Printed under the direction of the clerk.

1 UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between United States of America, plaintiff, vs. Emil Dieckerhoff, Adolph Erbslob, Rudolph Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Co., and of F. Boker and John Achelis, defendants, a manifest error hath happened, to the great damage of the said Emil Dieckerhoff et al., as is said and appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 10th day of November, 1903, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

2 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of October, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one *one* hundred and twenty-eighth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA.
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to thirty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Emil Dieckerhoff, Adolph Erbslob, Rudolph Erbslob, and Ludwig Erbslob, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis, plaintiffs in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this eighth day of January, in
3 the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[L. S.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit. Emil Dieckerhoff et al., plaintiffs in error, vs. United States of America, defendant in error. Writ of error. Curie, Smith & Maxwell, attorneys for plaintiffs in error, 22 William street, N. Y. City. A copy of the within paper has been this day received at this office, Oct. 16, 1903. Henry L. Burnett, U. S. atttorney. U. S. Circuit Court, Southern District, New York. Filed Oct. 16, 1903. John A. Shields, clerk.

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vgst.
EMIL DIECKERHOFF, ADOLPH ERBSLOB, RUDOLPH Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within
4 twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, this 5th day of February, in the year one thousand eight hundred and ninety-seven.

[L. S.] JOHN A. SHIELDS, *Clerk.*

WALLACE MACFARLANE,
United States Attorney, Plaintiff's Attorney.

Office and post-office address, U. S. P. O. Building, borough of Manhattan, New York City.

Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOH, RUDOLPH Erbsloh, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis.

The plaintiffs by Wallace Macfarlane, attorney of the United
5 States in and for the Southern District of New York, complain of the defendants, and allege upon information and belief:

I. That at the time hereinafter mentioned the defendants Emil Dieckerhoff, Adolph Erbsloh, Rudolph Erbsloh, and Ludwig Deuss, were copartners in business in the city of New York under the firm name of Dieckerhoff, Raffloer & Company.

II. That on or about the 21st day of December, 1896, the defendants Emil Dieckerhoff, Adolph Erbsloh, Rudolph Erbsloh, and Ludwig Deuss, in their said firm name as principals, and the defendants Carl F. Boker and John Achelis, as sureties, signed, sealed, executed, and delivered unto the plaintiffs their certain bond or writing obligatory, of which the following is a copy:

"*Bond for six months to cover the delivery of unexamined packages.*

"Know all men by these presents, That we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents; as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.

"The condition of this obligation is such, that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs,
in pursuance of section 2899, Revised Statutes of the United
6 States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presents of one of the officers of the customs; or if the above-bounded obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void; otherwise, to remain in full force and virtue.

"And the above-bounded obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to

be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof.

"Sealed with our seals this twenty-first day of December, one thousand eight hundred and ninety-six.

(Sgd.) "DIECKERHOFF, RAFFLOER & CO., [L. S.]

"By R. ERBSLOB, [L. S.]

(Sgd.) "CARL F. BOKER, [L. S.]

(Sgd.) "JOHN ACHELIS. [L. S.]

"Sealed and delivered in the presence of:

(Sgd.) "W. A. COURSEN."

7 III. That on or about the 13th day of January, 1897, while the said bond was in full force and effect, the defendants, composing the firm of Dieckerhoff, Raffloer & Company, imported into the port of New York and there made an entry in writing in the custom-house of seven cases, or packages, of merchandise, numbered 417 to 421, inclusive, and 983 and 984, imported per steamship "Bovic," January 13, 1897, entry number 7042, and at the time of such entry the collector designated one of the said cases or packages, numbered 418, to be sent to the public store for examination and appraisement; that the remaining cases or packages were, on or about said last-mentioned date and within six months from the date of said bond, delivered to the said firm of Dieckerhoff, Raffloer & Company from the custody of the officers of the customs of the port of New York in pursuance of section 2899 of the Revised Statutes of the United States and in reliance upon and by reason of the said bond.

IV. That at about the time of said entry the collector of the customs did endorse on said bond the estimated value of the whole of said importation, to wit, the sum of $1,522.00 in the manner and form in said bond provided.

V. That thereafter and on or about January 18, 1897, the packages of said importation designated by the collector and sent to the public stores to be opened and examined was appraised and reported to the said collector; and within ten days after said last-mentioned package had been so appraised and reported and on or about January 18, 1897, the collector ordered the defendants, Emil Dieckerhoff, Adolph Erbsloh, Rudolph Erbsloh, and Ludwig Deuss, composing the firm of Dieckerhoff,

8 Raffloer & Company to return to him package No. 420, one of the packages included in the importation aforesaid and delivered as aforesaid to the defendants composing the firm of Dieckerhoff, Raffloer & Company, as aforesaid, in reliance upon and by reason of said bond.

VI. That the defendant did not within ten days after the said package designated by the collector and sent to the public stores to be opened and examined had been appraised and reported to the collector return to the order of said collector the package of said importation No. 420, demanded by the collector aforesaid, without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs, and did not return the said

package No. 420 at all, but wholly neglected, failed, and refused to return the said package.

VII. And plaintiffs further allege that the defendants have wholly failed, neglected, and refused in lieu of returning said package No. 420 demanded as aforesaid to pay to the proper collecting officer of the port of New York where said importation was made and entered double the estimated value of the said package No. 420, which the said defendants failed and refused to return as aforesaid.

All contrary to the obligations of said bond and to the laws of the United States in such case made and provided.

Whereby an action has accrued to the United States for double the estimated value of said package of merchandise No. 420, to wit, the sum of $135.54, with interest from January 18, 1897.

Wherefore the plaintiffs pray judgment against the said defendants for the sum of $135.54, with interest from January 18, 1897.

WALLACE MACFARLANE,
Attorney of the United States in and for the Southern District of New York.

9 SOUTHERN DISTRICT OF NEW YORK, *ss:*

James F. Higgins, being duly sworn, deposes and says that he is in charge of the bond and balance of duty bureau of the U. S. attorney's office for said district.

That the foregoing complaint is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

That the action is brought upon a written instrument (a copy of which is included in and forms a part of said complaint) now in the possession of the collector of the port, as deponent believes.

That the sources of deponent's information and the grounds of his belief are correspondence with, and a copy of said bond furnished by said collector.

JAS. F. HIGGINS.

Sworn to before me this 5th day of February, 1897.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States vs. Emil Dieckerhoff et al. Summons and complaint. Wallace Macfarlane, United States attorney, attorney for plaintiff.

I hereby certify, that on the 8th day of February, 1897, at the city of New York, in my district, I personally served the within summons upon the within defendants, Ludwig Deuss and Carl F. Boker, by exhibiting to each of them the within original, and at the same time leaving with each of them a copy thereof. At the same time and place I deliv-

10 ered to and left with each of them a copy of the annexed complaint. John H. McCarthy, United States marshal, Southern District of New York. Dated Feb. 16, 1897. U. S. Circuit Court. Filed Jan. 27, 1898. John A. Shields, clerk.

At a stated term of the Circuit Court of the United States for the Southern District of New York, held at the City of New York, on the 28th day of January, 1898.

Present: Hon. Hoyt H. Wheeler, Judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOB, RUDOLPH Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis, defendants.

The argument of the demurrer to the complaint herein coming on to be heard, and plaintiffs appearing by Henry L. Burnett, esq., United States attorney for the Southern District of New York, and Max J. Kohler, esq., assistant U. S. attorney, and defendants by W. Wickham Smith, esq.

11 Now, on motion of Henry L. Burnett, United States attorney, the defendants not opposing, it is

Ordered, that the complaint herein be amended, by substituting therefor the complaint set up in Exhibit A, hereto annexed and made a part hereof.

HOYT H. WHEELER, *Judge.*

Entry of within order consented to.

CURIE, SMITH & MACKIE,
Attorneys for Defendants.

EXHIBIT A.

Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOB, RUDOLPH Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis.

The plaintiffs, by Henry L. Burnett, attorney of the United States in and for the Southern District of New York, complain of the defendants and allege upon information and belief:

I. That at the time hereinafter mentioned the defendants
12 Emil Dieckerhoff, Adolph Erbslob, Rudolph Erbslob, and Ludwig Deuss were copartners in business in the city of New York under the firm name of Dieckerhoff, Raffloer & Company.

II. That on or about the 21st day of December, 1896, the defendants Emil Dieckerhoff, Adolph Erbslob, Rudolph Erbslob, and Ludwig Deuss, in their said firm name, as principals, and the defendants Carl F. Boker and John Achelis, as sureties, signed, sealed, and executed, and delivered unto the plaintiffs their certain bond or writing, obligatory of which the following is a copy:

"Bond for six months, to cover the delivery of unexamined packages.

"Know all men by these presents, that we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.

"The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been
13 appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounded obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

"And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way effect the liability in those cases where there shall be a violation hereof.

"Sealed with our seals this twenty-first day of December, one thousand eight hundred and ninety-six.

(Sgd.) "DIECKERHOFF, RAFFLOER & CO., [L. S.]
"By R. ERBSLOH. [L. S.]
(Sgd.) "CARL F. BOKER. [L. S.]
(Sgd.) "JOHN ACHELIS. [L. S.]

"Sealed and delivered in the presence of—
(Sgd.) "W. A. COURSEN."

III. That on or about the 13th day of January, 1897, while the said bond was in full force and effect, the defendants, who composed the
14 firm of Dieckerhoff, Raffloer & Company, imported into the port of New York and there made an entry in writing in the custom-house of seven cases or packages or merchandise, numbered 417 to 421, inclusive, and 983 and 984, imported per steamship "Bovic," January 13, 1897, entry number 7,042, all of which was merchandise liable to be inspected and appraised, and at the time of such entry the collector designated one of the said cases or packages, numbered 418, to be sent to the public store for examination and appraisement; that the

remaining cases or packages were, on or about said last-mentioned date and within six months from the date of said bond, delivered to the said firm of Dieckerhoff, Raffloer & Company from the custody of the officers of the customs of the port of New York in pursuance of section 2899 of the Revised Statutes of the United States and in reliance upon and by reason of the said bond.

IV. That at about the time of said entry the collector of customs did endorse on said bond the estimated value of the whole of said importation and entry, to wit, the sum of $1,522.00, in the manner and form in said bond provided, and the estimated value of package No. 420, more particularly referred to hereinafter, was $185.00, and the estimated value of the invoice containing said package No. 420 was $806.

V. That thereafter and on or about January 18th, 1897, the package of said importation designated by the collector and sent to the public stores to be opened and examined was appraised and reported to the said collector, and within ten days after said last-mentioned package had been so appraised and reported and on or about January 18th, 1897, the collector ordered the defendants, Emil Dieckerhoff, Adolph Erbslob,
15 Rudolph Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, to return to him package No. 420, one of the packages included in the importation aforesaid and delivered as aforesaid to the defendants composing the firm of Dieckerhoff, Raffloer & Company, as aforesaid, in reliance upon and by reason of said bond.

VI. That the said defendants did not within ten days after the said package designated by the collector and sent to the public stores to be opened and examined had been appraised and reported to the collector, delivered to the order of said collector the package of said importation No. 420, demanded by the collector aforesaid, without having been opened except with the consent of the collector or surveyor given in writing, and then in the presence of one of the officers of the customs, and did not return the said package No. 420 at all, but wholly neglected, failed, and refused to return the said package.

VII. And plaintiffs further allege that the defendants have wholly failed, neglected, and refused in lieu of returning said package No. 420 demanded as aforesaid, to pay to the proper collecting officer of the port of New York where said importation was made and entered, double the estimated value of the said package No. 420 which said defendants failed and refused to return as aforesaid, to wit, the sum of $370.00.

All contrary to the obligations of said bond and to the laws of the United States in such case made and provided.

Wherefore, the plaintiffs pray judgment against the said defendants for the sum of $3,044.00 with interest from January 18, 1897.

HENRY L. BURNETT,
Attorney for the United States in and
for the Southern District of New York.

16 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Max J. Kohler, being duly sworn, deposes and says that he is an assistant to the United States attorney for the Southern District of New York and has charge of this action. The foregoing complaint is

true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the action is brought upon a written instrument (a copy of which is included in and forms a part of said complaint) now in the possession of the collector of the port, as deponent believes.

That the sources of deponent's information and the grounds of his belief are correspondence with, and a copy of said bond furnished by, said collector, and other documents and reports now in his possesion.

MAX J. KOHLER.

Sworn to before me this 26th day of February, 1898.

C. S. HOUGHTON,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States vs. Emil Dieckerhoff et al. Order amending complaint, &c. Wallace Macfarlane, United States attorney, attorney for plaintiff. U. S. Circuit Court. Filed Mar. 1, 1898. John A. Shields, clerk.

17 U. S. Circuit Court, Southern District of New York.

UNITED STATES, PLAINTIFF,
vs.
EMIL DIECKERHOFF ET AL., DEFENTANT.

The defendants above named, by Curie & Smith, their attorneys, answering the complaint of the plaintiff:

I. Deny any knowledge or information sufficient to form a belief as to the first allegation in the fifth paragraph of said complaint, and therefore they deny the same.

II. Deny that by reason of any fact alleged in the complaint the plaintiff suffered damage in the sum of $3,044 or in any other sum or that the plaintiffs have suffered any damage whatever.

Wherefore, defendants pray that the complaint of the plaintiff be dismissed.

CURIE & SMITH,
Attorneys for Defendant, 22 William Street, N. Y. City.

RUDOLPH ERBSLOB.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Rudolph Erbslob, being duly sworn, deposes and says: That he is one of the defendants herein; that he has read the foregoing answer
18 and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

RUDOLPH ERBSLOB.

Sworn to before me this 4th day of May, 1901.

[SEAL.] J. L. F. PHILGUS,
Notary Public, County of Kings.

Certificate filed County of New York.

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States vs. Emil Dieckerhoff et al. Answer. Curie & Smith, attorneys for defendant, 22 William street, N. Y. City. Service of a copy of the within answer is hereby admitted. May 4, 1901. Henry L. Burnett, U. S. atty. for plff. U. S. Circuit Court. Filed May 8, 1901. John A. Shields, clerk.

19 At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States court rooms in the borough of Manhattan, in the city of New York, on Friday, the 24th day of October, in the year of our Lord one thousand nine hundred and two.

Present: The honorable Alfred C. Coxe, circuit judge.

THE UNITED STATES
vs.
EMIL DIECKERHOFF ET AL.

Now comes the plaintiff by Charles Duane Baker, esq., assistant United States attorney, its attorney, and moves the trial of this cause. Likewise come the defendants by W. Wickham Smith, esq., their attorney. Thereupon a jury is empaneled and the cause proceeds to trial.

After hearing the evidence for the plaintiff and the argument of counsel, the jury, by direction of the court, say they find a verdict for the plaintiff for $369.12, and so say they all.

Stay of 60 days in which to make and serve a case.

An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

20 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOH, RUDOLPH ERBSLOH, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Co., and of F. Boker and John Achelis.

The issues of law and fact raised in the above-entitled action by the pleadings therein having come on for trial at a stated term of the United States Circuit Court, held in the said district, in the United States Court and Post-Office Building, in the city of New York, on the 24th day of October, 1902, before Hon. Alfred C. Coxe, C. J., and a jury, and such issues having been duly tried, and a verdict duly rendered therein by the jury as directed by the court, in favor of the plaintiff, in the sum of three hundred and sixty-nine ($369.12) dollars and twelve cents, being the sum of twice the amount of the estimated value of one package of merchandise as alleged in the complaint in the said action and to recover which said action was commenced, and the costs in said action having been duly taxed and adjusted at the sum of thirty 87 100 dollars ($30.87).

Now, on motion of Henry L. Burnett, United States attorney for the

Southern District of New York, attorney for the plaintiff, it is
21 Ordered, adjudged, and decreed, that the United States, the plaintiff above named, do recover the amount of said verdict, viz, three hundred and sixty-nine dollars and twelve cents ($369.12) and the costs and disbursements of this action amounting to thirty 87 100 dollars, making in all the aggregate sum of $399.99 100; and it is

Further ordered, adjudged, and decreed, that the plaintiff have execution therefor.

Dated, New York, April 16, 1903.

JOHN A. SHIELDS,
Clerk U. S. Circuit Court.

Consented to as to form.

CURIE, SMITH & MAXWELL.

(Endorsed.) U. S. Circuit Court, Southern District of New York. United States of America vs. Emil Dieckerhoff et al. Judgment. Henry L. Burnett, United States attorney, attorney for plaintiff. U. S. Circuit Court, Southern District of New York. Filed Apr. 16, 1903. John A. Shields, clerk.

22 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOB, RUDOLPH Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis.

Be it remembered, that on the 23d day of October, 1902, this case was brought on for trial in the United States Circuit Court for the Southern District of New York, before the Hon. Alfred C. Coxe, circuit judge. A jury was duly impaneled and sworn.

John T. Linnen, called as a witness on behalf of the plaintiff, testified as follows:

I am a clerk in the custom-house and have been for a good many years. The paper now produced is an entry of certain goods in the custom-house.

The witness produced entry of merchandise in the name of Dieckerhoff, Raffloer & Company per S. S. "Bovic," January 13, 1897, entry No. 7042. The same was received in evidence and covered seven cases of goods numbered 417, 418, 419, 420, 421, 983, and 984, respectively.

Witness continued:

I see a statement on the back of the entry as to the package that was sent to the appraisers' stores. Two packages were sent numbered
23 respectively 418 and 983, but only one of them belongs on the invoice in the case in controversy. That is 418. In the course of business the other packages numbered on the invoices are turned over to the importer and number 418 was the only one reserved in this case. The invoice shows the value of case 418 to be 20 pounds 9 shillings 5

pence, equivalent to $99.62, and the rate of duty assessed on case 418 was 35 per cent, equivalent to $34.87. The paper I now produce is the invoice covering case No. 418. The invoice was received in evidence. It covered 5 cases of goods, namely, cases 417–421, inclusive. The total value of these 5 cases was 169 pounds 9 shillings, equivalent to $823.62.

Plaintiff then offered in evidence the original bond entitled "Bond for six months, No. 411." The same was received in evidence and is as follows:

"*Bond for six months to cover the delivery of uncertained packages.*

"Know all men by these presents that we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.

"The condition of this obligation is such, that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the
24 customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void; otherwise, to remain in full force and virtue.

"And the above bounden obligors do for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof.

"Sealed with our seals this twenty-first day of December, one thousand eight hundred and ninety-six.

(Sgd.) "DIECKERHOFF, RAFFLOER & CO., [L. S.]
"By R. ERBSLOH.
(Sgd.) "CARL F. BOKER. [L. S.]
(Sgd.) "JOHN ACHELIS. [L. S.]

"Sealed and delivered in the presence of
(Sgd.) "W. A. COURSEN."

25 The book in which this bond was found was identified by the witness as an original record of the custom-house and bond book, and the bond identified as that of Dieckerhoff & Company, and defendants admitted that Messrs. Dieckerhoff and Erbslob, Boker and Achelis duly executed the bond. Witness continued:

I find on the back of the invoice a request as follows: "Please send case 420 to public stores, dated January 18th, '97."

Defendants admitted that the collector called on the importer for the return of package 420, and that the same was not returned. Witness continued:

I have made an estimate of the value of package 420 from the invoice itself as of the time that the entry was made and the bond executed.

Q. Now, what was the value as you estimated of package 420?

(Objected to on ground that the bond requires that the estimation shall be made by the collector at the time of the entry and endorsed on the bond, and that it can not be made by this witness in court after the suit had been brought upon the bond.

The objection was overruled, and the defendants then and there duly excepted, and the exception was duly noted and allowed.)

A. $184.56.

Witness cross-examined by defendants' counsel.

I find an endorsement on this bond reading as follows: "Vessel 'Bovic,' where from Liverpool, amount $1,522." That is all that I can see. I do not see an endorsement on the bond of the value of this particular case 420. Case 418 was sent to the public stores within a day or two of the entry, presumably at the time of entry. I find an

26 endorsement on the invoice that shows that package 418 was delivered to the importers on February 8, 1897. Plaintiffs then and there rested their case. Defendants offered no evidence. Counsel for plaintiffs conceded that there was no proof in the case that the United States suffered any damage by reason of the failure of the defendants to return package 420, and that there could be no proof, and asked, as matter of law, for the recovery of double the value of package 420, to wit, the sum of $369.12. Counsel for defendants then and there moved for the direction of a verdict for the defendants on the following grounds:

1. That there was no proof whatever in the case of any damage sustained by the plaintiff by reason of the failure of the firm of Dieckerhoff, Raffloer & Company to return these packages, and that in the bond, which is a penal bond, expressly so stipulated in its terms, it provides what the penalty of the bond shall be, and that there can be no recovery in the absence of such proof.

2. That the bond, while it purports to be made under section 2899 of the Revised Statutes, does not conform to the provisions of that section.

3d. That the collector did not endorse upon the bond the estimated value of the package not returned, and that there was no competent legal proof in the case of the value of such package.

The motion was denied, to which ruling and refusal the defendants then and there by their counsel duly excepted, and the exception was duly noted and allowed.

Counsel for the defendants then made a separate motion for the direction of a verdict in favor of the sureties on two grounds:

1st. That there was no proof in the case of any demand by the collector upon the importers for the payment of double the value of
27 the package which was called for and not returned, and that as against sureties such a demand was necessary to entitle the plaintiff to sue.

2d. On the ground that it appeared affirmatively by the proof that at the time the importers failed to return package 420 the collector had in his hands public stores case 418, and that he should have retained said package to satisfy any claim he had against the importers, and that the proof is that he delivered it to them after the commencement of this action.

The motion to direct a verdict in behalf of the sureties was denied, to which ruling and refusal the defendants then and there by their counsel duly excepted, and the exception was duly noted and allowed.

Counsel for the plaintiff then moved for the direction of a verdict for the plaintiff for twice the amount of the estimated value of the package not returned, to wit, for the sum of $369.12. This motion was granted by the court, and a verdict directed in favor of the plaintiff for the sum of $369.12, to which ruling and direction the defendants by their counsel then and there duly excepted, and the exception was duly noted and allowed.

And forasmuch as the matters hereinabove set forth would not otherwise appear of record, the judge before whom the case was tried has settled and signed the foregoing bill of exceptions, and ordered the same to be entered as of the 23d day of October, 1902.

Dated New York, March 31, 1903.

ALFRED C. COXE,
U. S. Circuit Judge in and for the Southern District of New York.

28 It is hereby consented to that the foregoing be signed and filed as the bill of exceptions in this case.

Dated New York, March 31, 1903.

HENRY L. BURNETT,
U. S. Attorney, Attorney for Plaintiff.

CURIE, SMITH & MAXWELL,
Attorneys for Defendants.

(Endorsed:) United States Circuit Court, Southern District of New York. United States of America vs. Emil Dieckerhoff, Adolph Erbslob, Rudolph Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis. Bill of exceptions. Curie, Smith & Maxwell, attorneys for defendants, 22 William street, New York. U. S. Circuit Court, Southern District of New York. Filed Apr. 6, 1903, nunc pro tunc as of Oct. 23, 1902. John A. Shields, clerk.

U. S. Circuit Court of Appeals for the Second Circuit.

EMIL DIECKERHOFF ET AL., PLAINTIFFS IN error,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } Assignment of errors.

Afterwards, to wit, on the 12th day of October, 1903, before the
29 judges of the said court at the city of New York comes the said plaintiffs in error, by Currie, Smith & Maxwell, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears:

1st. That a demurrer to the amended complaint herein on the ground that it did not set forth the facts sufficient to constitute a cause of action was denied.

2d. That an order overruling a demurrer to the complaint herein on the ground that it did not set forth facts sufficient to constitute a cause of action was entered.

3d. That evidence was improperly admitted upon the trial of the value of the public store case, as estimated by a witness in court upon the trial, instead of proving the estimation by the collector at the time of the entry and endorsed on the bond.

4th. That a motion by the defendant in error for the direction of a verdict in his favor was granted.

5th. That a motion by the plaintiffs in error for the direction of a verdict in their favor was denied.

6th. That a verdict was directed in favor of the defendant in error for double the value of the package called for by the collector and not returned.

7th. That the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error.

8th. That the said judgment was not given for the said plaintiffs in error against the said defendant in error.

30 And the plaintiffs in error pray that the judgment aforesaid for the errors aforesaid, and other error in the record and the proceedings aforesaid, may be reversed and nulled and altogether held for nothing, and that the said plaintiffs in error may be restored to all things which they have lost by occasion of said judgment, &c.

CURIE, SMITH & MAXWELL,
Attorneys for plaintiffs in error, 22 William street, N. Y. City.

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Emil Dieckerhoff et al., plaintiffs in error, vs. The United States, defendant in error. Assignment of errors. Curie, Smith & Maxwell, attorneys for plaintiffs in error, 22 William street, N. Y. City. U. S. Circuit Court, Southern District of New York. Filed Oct. 12, 1903. John A. Shields, clerk.

United States Circuit Court of Appeals for the Second Circuit.

EMIL DIECKERHOFF ET AL., PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Now comes freely into court the United States, defendant in
31 error, charged herein, by Henry L. Burnett, United States attorney, its attorney, and says:

That there is no error in the record in the proceedings in said case, or in the giving of the judgment therein, and the United States prays that the said Circuit Court of Appeals, before the justices thereof now here, may proceed to examine the record and proceedings aforesaid as to the matters assigned for error herein, and that the judgment aforesaid, in form as aforesaid given, may be in all things affirmed and the United States be hence dismissed.

Dated New York, October 17, 1903.

HENRY L. BURNETT,
United States Attorney, Attorney for Defendant in Error.

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. Emil Dieckerhoff et al., plaintiffs in error, vs. The United States, defts. in error. Joinder in error. Henry L. Burnett, United States attorney, attorney for deft. in error. U. S. Circuit Court, Southern District of New York. Filed Oct. 17, 1903. John A. Shields, clerk.

32 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOH, Rudolph Erbsloh, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Co., and of F. Boker and John Achelis, defendants.

Know all men by these presents, that I, William H. Northup, am held and firmly bound unto the above-named United States in the sum of one thousand ($1,000) dollars, to be paid to the United States for the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with my seal and dated the 10th day of October, in the year of our Lord one thousand nine hundred and three.

Whereas the above-named defendants have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above-entitled suit by the judge of the Circuit Court of the United States for the Southern District of New York;

Now therefore, the condition of this obligation is such that
33 if the above-named defendants shall prosecute the appeal to effect and answer all damages and costs, if defendants fail to make

said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered and taken and acknowledged this 10th day of October, 1903, before me,

WM. H. NORTHRUP. [SEAL.]

UNITED STATES OF AMERICA,
Southern District of New York, ss:

William H. Northrup, being duly sworn, deposes and says that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

WM. H. NORTHRUP.

Sworn to this 10th day of October, 1903, before me.
[SEAL.] JOHN K. MAXWELL, *N. P. Co.*

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States of America, plaintiff, vs. Emil Dieckerhoff, Adolph Erbsloh, Rudolph Erbsloh, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Co., and of F. Boker and John Achelis, defendants. Bond for damages and costs. Curie, Smith & Maxwell attorneys for defendants, 22 William street, New York. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the plaintiff of the right at any time to examine the surety at any time under oath, touching his assets, liabilities, and financial condition generally. E. Henry Lacombe, U. S. circuit judge. U. S. Circuit Court, Southern District of New York. Filed Oct. 12, 1903. John A. Shields, clerk.

34 By the Honorable E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To the United States of America, defendant in error, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the borough of Manhattan in the city of New York, in the district and circuit above named, on the 10th day of November, 1903, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Emil Dieckerhoff et als. are plaintiffs in error, and you are cited to show cause, if any there be, why the judgment in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 12th day of October, in the year of our Lord one thousand nine hundred and three, and of the Independence of these United States the one hundred and twenty-eighth.

E. HENRY LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Emil Dieckerhoff, Adolph Erbsloh, Rudolph Erbsloh, and

Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Co., and of F. Baker and John Achelis, plaintiffs in error, vs. United
35 States of America, defendant in error. Citation. Curie, Smith & Maxwell, attys. for plffs. in error, 22 William street, New York City. A copy of the within paper has been this day received at this office, Oct. 16, 1903. Henry L. Burnett, U. S. attorney, N. Y. U. S. Circuit Court, Southern District, New York. Filed Oct. 16, 1903. John A. Shields, clerk.

36 United States Circuit Court, Southern District of New York.

Present: The Hon. E. Henry Lacombe, U. S. Circuit Judge.

UNITED STATES, PLAINTIFF,
vs.
EMIL DIECKERHOFF ET AL., DEFENDANTS.

Upon reading and filing the annexed consent of the United States attorney, the attorney for the plaintiff herein, and on motion of Curie, Smith & Maxwell, attorneys for the defendants herein,

It is hereby ordered, that the record in this cause heretofore certified to the Circuit Court of Appeals for the Second Circuit be amended to include the following proceedings:

First. The demurrer to the amended complaint herein.

Second. The opinion of the Honorable William K. Townsend, U. S. circuit judge, overruling the demurrer herein.

Third. The order entered upon the decision overruling the demurrer.

Dated New York, Dec. 5, 1904.

E. H. LACOMBE,
U. S. Circuit Judge.

37 United States Circuit Court, Southern District of New York.

UNITED STATES, PLAINTIFF,
vs.
EMIL DIECKERHOFF ET AL., DEFENDANTS.

It is hereby consented to that the record heretofore returned to the United States Circuit Court of Appeals for the Second Circuit, in this cause be amended to include the following proceedings:

First. The demurrer to the amended complaint herein.

Second. The opinion of the Honorable William K. Townsend, United States circuit judge, overruling the demurrer herein.

Third. The order entered upon the decision overruling the demurrer.

Dated New York, December 5, 1904.

HENRY L. BURNETT,
U. S. Attorney.

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States, plaintiff, vs. Emil Dieckerhoff et al., defendants. Consent and order amending record. U. S. Circuit Court, Southern District of New York. Filed Dec. 5, 1904. John A. Shields, clerk.

38 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
EMIL DIECKERHOFF, ADOLPH ERBSLOH, Rudolph Erbsloh, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and Carl F. Boker and John Achelis.

The defendants above named, by Curie & Smith, their attorneys, demur to the complaint herein upon the ground that the same does not set forth facts sufficient to constitute a cause of action.

Wherefore, defendants demand that the said complaint be dismissed, with costs.

Dated New York, March 19, 1898.

CURIE & SMITH,
Attorneys for Defendants,
No. 46 Exchange Place, N. Y. City.

39 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA
agst.
EMIL DIECKERHOFF AND OTHERS.

Townsend, Judge:

The questions herein arise on a demurrer to the complaint in an action at law brought by the United States on a custom-house bond, taken under section 2899 of the Revised Statutes.

The bond is for the sum of fifty thousand ($50,000) dollars. The essential part of the condition is as follows:

"The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened, except with the consent of the collector or surveyor given in writing, and then in the presence of one of the officers of the customs; or if the above bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double
the estimated value of the package or packages of merchandise
40 not so returned, then this obligation is to be void; otherwise to remain in fullforce and virtue."

The question at issue is stated by the defendant as follows:

"The real question of law to be determined upon this demurrer is whether the amount stipulated in these bonds, given pursuant to section

2899, Revised Statutes, is to be regarded as a penalty to secure the payment of actual damages sustained and proved by the United States, or whether said amount is to be regarded as liquidated damages which the obligors of the bond may be compelled to pay, without proof that the United States has suffered any damage whatever, or as a statutory penalty in the nature of punishment for the violation of a statutory duty."

The complaint alleges that a certain package, No. 420, of the estimated value of $185, was ordered to be returned, and that its return was refused.

That such refusal was a breach of the bond is not disputed.

The defendant claims that only such actual damage as the plaintiff can prove it has suffered can be recovered in this action.

The purpose of the bond is manifestly to prevent packages from being sold or opened, except in the presence of the collector, until the amount of duty to be paid thereon has been finally ascertained. In case fraud in valuation is suspected, any package can be called for and examined.

The plaintiff insists that the intent of the law will be made effective by construing the condition of the bond to mean that, for any package not so returned upon demand, there shall be paid twice its estimated value.

The only actual injury suggested in defendants' brief, for which, on their theory, damages could be awarded, would seem to be the additional expense of proving the contents of the package, caused by its absence.

Loss of duties by reason of fraudulent description of contents
41 of the package could not well be considered as actual damage arising from the refusal to return the goods to the collector for inspection; and, even if they could be so considered, the result would not be satisfactory; for, if the Government should fail to establish the fraud by reason of the absence of the package called for, it could not recover for any such damage.

Defendants say that there can be other evidence as to the contents of the packages than such as is obtained by an inspection of the packages themselves by the collector, and adds:

"The cases containing the goods are only one kind of evidence by which to establish the character of the goods. Many cases will be found in the books where the character of imported merchandise, in suits by the Government for forfeiture or duties, has been established by the testimony of informers and by the testimony of foreign shippers, by documentary evidence, and in many other ways. It may be harder to get this kind of evidence than it would be to open the cases if they could be produced, but this is no reason for giving a harsh and unreasonable construction to a statute seventy years after its enactment."

The object of the bond is to dispense with the necessity of resorting to such evidence.

Defendants throughout maintain that if plaintiff is entitled to recover at all for anything except for actual damage alleged and proved, it must recover twice the value of the whole shipment of which the package formed a part; and that such a penalty would be too severe.

Such is not the proper construction of the bond.

Upon the complaint as it stands, plaintiff, unless further answer is made, is entitled to recover, as liquidated damages, double the estimated

value of the packages called for and not returned; and this is not a harsh or excessive penalty.

42 To sustain the demurrer would violate the plain intent of the statute, and render it practically useless.

The demurrer is overruled.

(Endorsed:) U. S. Circuit Ct., So. Dist. of N. Y. U. S. vs. Emil Dieckerhoff. Opinion. U. S. Circuit Court. Filed Apr. 6, 1900. John A. Shields, clerk.

At a stated term of the Circuit Court of the United States, held in and for the Southern District of New York, at the United States court and post-office building in the city of New York, on the 9th day of April, 1901.

Present: Hon. William K. Townsend, district judge.

THE UNITED STATES
against
EMIL DIECKERHOFF ET AL.

The above-entitled action having been brought on for argument on the issues of law raised by the complaint of the plaintiff and the demurrer of the defendant, and after hearing W. Wickham Smith, esq., of counsel for the defendant, in support of the demurrer, and Henry L. Burnett, esq., United States attorney, of counsel for the plaintiff (Charles D. Baker, esq., assistant United States attorney), in opposition thereto;

Now, on motion of Henry L. Burnett, United States attorney, it is

Ordered, adjudged, and decreed that the said demurrer be, and
43 the same is hereby, overruled, and that the defendant have twenty days in which to answer said complaint.

WM. K. TOWNSEND, *Judge.*

Assented to as to form.

CURRIE & SMITH,
Attorneys for Defts.

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States vs. Emil Dieckerhoff et al. Order on demurrer. Henry L. Burnett, United States attorney, attorney for plff. Due service of a copy of the within is hereby admitted. New York, April 9th, 1901. Currie & Smith, attorneys for defts. U. S. Circuit Court. Filed Apr. 10, 1901. John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to eight, inclusive, contain a true and complete transcript of the demurrer, opinion overruling demurrer, and order thereon had in said court, in the cause entitled The United States, plaintiff, against Emil Dieckerhoff et al., defendants, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 7th day of December, in the year of our Lord one thousand nine hundred and four, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

44 United States Circuit Court of Appeals for the Second Circuit.

No. 22. October term, 1904.

Argued December 22, 1904. Decided February 1, 1905.

EMIL DIECKERHOFF ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace and Lacombe, C. J., and Holt, D. J.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the United States for $369.12 on a customs bond.

Lacombe, circuit judge.

On or about January 13, 1897, the plaintiffs' firm imported seven cases of goods. The collector sent one of these packages (case 418) to the public stores and delivered the remaining cases to the importers. Prior to this importation a bond for the delivery of unexamined packages, commonly known as a six months' bond, had been executed by these importers, with sureties. On or about January 18, 1897, the collector, having received a report from the appraiser, called upon the defendants to send case No. 420 to the public stores, which request was not complied with. Subsequently suit was brought on the bond for $3,044, being double the estimated value of the importation. It was conceded on the trial that there was no proof that the United States suffered any damage by reason of the failure of the importers to return said package No. 420, and that there could be no proof. A clerk from the
45 custom-house testified, against objection and exception, that he had made an estimate of the value of package 420 from the invoice, and that the value thereof was $184.56. The court directed a verdict for double that amount.

Imported merchandise is examined by the customs officers so that it may be properly appraised and classified. In order to facilitate such examination the collector, under authority of statute, usually directs that one package out of every ten in each entry be examined; if the result is satisfactory the others are not opened, or the collector may, for any cause, within ten days after the result of the examination of the package or packages first selected is reported to him order another or as many other packages as he pleases to be also examined. If all the packages comprising each importation were kept in the custody of the Government during this period greater warehouse capacity would be required, and as

far back as 1830 provision was made for a delivery of part of his importation to the importer. That statute is now section 2899, U. S. Revised Statutes, and reads as follows:

"No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case be forfeited."

46 This statute contemplated a separate special bond for each importation. In practice it has been found convenient to take a general bond running for six months, which is based upon a scheme by which this general bond, by a system of endorsements, authorized to be made and made by the collector of the estimated value of each importation is transferred into a series of separate bonds, with penalties in double the estimated value of each importation, and the statutory conditions stated applicable to each separate entry. Such general six months' bond is authorized by Treasury Regulations, and the propriety of exacting it in place of separate special bonds is not disputed.

The bond sued upon is in the amount of $50,000 and provides:

"The condition of this obligation is such, that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined, have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounded obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void; otherwise, to remain in full force and virtue.

"And the above-bounded obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall endorse on this bond the estimated value of each importation as

47 made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there

is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof."

It will be observed that in one respect the bond fails to conform to the statute. In the first paragraph above quoted it is provided that the bond shall be void if the "obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned." The statute provides that the security shall be in double the value of the merchandise delivered to the importer, and that if "any package" is improperly opened or is not delivered to the order of the collector "the bond shall, in either case, be forfeited." This error in phraseology is corrected, however, in the second paragraph, where the obligors covenant that the penalty of the bond shall be held to be double the value of each importation as made and endorsed. The defendants concede that such is the proper construction of the bond, and that it is a valid bond providing such penalty; and inasmuch as the only bond the collector was authorized to take was one conformable to the statute, the bond in suit is to be considered as if the inconsistent words in its first paragraph were eliminated.

It is elementary law that the penalty named in a bond will be considered as covering, to the extent of the sum named, the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party. It is incumbent upon the party who claims that the penalty is liquidated damages to show that they were so considered by the contracting parties. Tayloe v. Sandford (7 Wheat., 13). Certainly there is nothing on the face of this bond to indicate that the parties agreed that it should be so considered. There
48 is a line of authorities, some of which are cited on the briefs, holding that where the sum named in the bond is a fixed penalty imposed by law as a punishment for a breach of duty enjoined by law, the court will not undertake to alter or refuse the penalty which the legislature has fixed for the non-performance of a statutory duty. It was so held in Clark v. Barnard (108 U. S., 436), where the statute granting authority to extend a line of railroad provided that the railroad company should deposit with the State treasurer "their bond in the sum of $100,000 that they will complete the said road before Jan., 1872." In U. S. v. Pingree (1 Sprague, 339) the bond was for rewarehousing, and the statute expressly provided that if the goods were not rewarehoused the collector should levy and collect the original duty plus an additional duty of 100 per cent. In U. S. v. Oteri (67 F. R., 146) the law required that in cases of withdrawal for export the exporter should give bond, in a penal sum equal to double the amount of the estimated duties, to produce the proof required by law of the landing of the same beyond the limits of the United States. In U. S. v. Hatch (1 Paine, 336) the statute required the master to enter into a bond in the sum of $400 that he shall exhibit a certain certified copy of a list of his crew, and also the crew (except such as may have died, absconded, etc.), to the boarding officer at the first United States port he might reach. In U. S. v. Montell (Taney's Dec., 47) the statute required a bond to be given in an amount which varied with the tonnage of the vessel, conditioned that the certificate of registry of the vessel shall be solely used for the vessel for

which it is granted, and shall not be sold, lent, etc. The court said: "It would be difficult by any course of proof or by any process of reasoning to show that the United States had sustained any particular amount of damages in a case of this description, or to adopt any rule by which the damages could be measured by a jury or be liquidated by agreement between the parties. The sum for which the parties are to become bound is manifestly a penalty or forfeiture, inflicted by
49 the sovereign power for a breach of its laws. It is not a liquidated amount of damages due upon a contract, but a fixed and certain punishment for an offence."

The case here presented is more like that in U. S. v. Cutajar (67 F. R., 530). The object of the bond is to protect the Government in assessment, valuation, and collection of its duties. By inspection of the contents of any package the customs officers ascertain what the goods are and what their value is. They are thus enabled to liquidate the amount of duty in the event of undervaluation to impose excess duties, and in the event of fraud to proceed to forfeit the goods. With the package in their possession it is a very easy matter to ascertain its contents, but such information may be obtained otherwise—the persons who packed it or saw it packed, the persons who unpacked it or who took possession of its contents could show what those contents were. It might be an expensive matter to procure this testimony as to any missing package, but the penalty of the bond is large enough to cover such expenses and all additional duties besides. These are the damages which the Government sustains by reason of the non-return of the package, and in our opinion the bond is conditioned to make good such damages within the limit named in the penalty, double the estimated value of the importation. The argument that great hardship might result from any particular construction of an act of Congress is not usually of much weight, but it may fairly be considered that if the sum named in the bond were held to be liquidated damages an importer might not infrequently be fined $50,000 or $100,000, when his importation was a large one, merely because he had opened a single package worth, may be, $100 in the presence of an inspector, but without the written consent of the collector or surveyor.

The judgment is reversed and cause remanded for a new trial.

W. Wickham Smith, for the plaintiffs in error.

Charles D. Baker, assistant United States attorney, for the defendant in error.

50 United States Circuit Court of Appeals for the Second Circuit.

No. 22.—October term, 1904.

Argued December 22, 1904. Decided February 1, 1905.

EMIL DIECKERHOFF ET AL., PLAINTIFFS IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace and Lacombe, C. J., and Holt, D. J.

WALLACE, Circuit Judge:

As I do not wholly concur in the opinion of Judge Lacombe, I will briefly state the reasons why I think the judgment should be reversed.

If the bond instead of being a statutory were only a voluntary bond, it is too plain to admit of discussion that the double value would be regarded as a penalty, and the obligors would be liable only for the damages actually sustained by the obligee by a breach of any of the conditions. Bignall v. Gould (119 U. S., 495). Being a statutory bond, however, it is to be treated as imposing upon the obligors the liability contemplated by the statute.

If it is the meaning of section 2899 that the importer shall become liable under his bond for double the value of his entire importation of merchandise in case he fails to redeliver a single package of it to the customs officers for reappraisement within the ten days specified, the judgment below ought to be affirmed upon the ground that it is a more favorable one to the defendants than they were entitled to.

51 I think this is not the meaning of the statute, and that its language does not require such a harsh construction. It permits the collector to estimate the value of all the packages, and requires him to exact a bond from the importer in double the estimated value of the whole number, which is to be so conditioned that it shall be forfeited if within a specified time all those delivered to the importer are not redelivered to the collector, or if any one of them is not redelivered, or if any one of them in the meantime shall have been irregularly opened. The obvious purpose of the bond is to amply protect the Government in the event that none of the packages should be redelivered, or any one of them should not be redelivered, or any one of them should have been opened without the consent of some of the officers of the customs; and the circumstance that the undertaking is to be in double the sum of any conceivable loss is convincing that the sum is in the nature of a penalty and not of liquidated damages.

If the construction contended for by the Government is correct and the bond liquidates the damages recoverable of the importer without any regard to the loss which may accrue to the Government, and makes him liable to the same extent whether a single package is inadvertently opened or the redelivery of all the packages is refused, such a construction is so inequitable that it is impossible to believe it was contemplated by Congress.

The language of the statute is satisfied by regarding the double value as the penalty of the bond and the maximum of the importer's liability. Van Buren v. Digges (52 U. S., 461–476).

If this construction is correct, it follows that the penalty, like that of bonds ordinarily, when the parties do not agree that it shall be construed as liquidated damages, is recoverable only to the extent of the damage accruing upon the breach. It was incumbent upon the Government upon the trial to prove the damages arising from the breach of the conditon. The breach consisted in the refusal or neglect of the importers to rede

liver to the collector one of the packages of their importation.

52 The Government was entitled to the redelivery of that package, and I think its measure of damages for the breach was the value of the package. In other words, the Government was entitled to recover the damages ordinarily recoverable for the breach of a promise to redeliver goods which the promisee has temporarily entrusted to the possession of the promisor.

An estimate of the value of the package from the importers' invoice was competent evidence, and the Government was entitled to a recovery of the value thus shown.

W. Wickham Smith, for the plaintiffs in error.

Charles D. Baker, assistant United States attorney, for the defendant in error.

53 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 14th day of February, one thousand nine hundred and five.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Ci cuit Judges, and Hon. George W. Holt, District Judge.

EMIL DIECKERHOFF ET AL., PLAINTIFFS IN ERROR,
vs.
UNITED STATES, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said Circuit Court be and it hereby is reversed, and cause remanded with instructions for a new trial.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

E. H. L.

54 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Dieckerhoff vs. U. S. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed February 14, 1905. William Parkin, clerk.

55 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 54, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Emil Dieckerhoff et al., plaintiffs in error, against United States, defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York in the Second Circuit, this 3rd day of April, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.]

WM. PARKIN, *Clerk.*

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Being informed that there is now pending before you a suit in which Emil Dieckerhoff, Adolph Erbslob, Rudolph Erbslob, and Ludwig Deuss, composing the firm of Dieckerhoff, Raffloer & Company, and F. Boker and John Achelis are plaintiffs in error and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and
57 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of April, in the year of our Lord one thousand nine hundred and five.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

58 (Indorsed:) File No., 19710. Supreme Court of the United States. No. 610, October term, 1904. The United States vs. Emil Dieckerhoff et al. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1905. William Parkin, clerk.

59 *To the honorable the Supreme Court of the United States, greeting:*

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel

is hereto annexed and certified as a return to the writ of certiorari issued herein.

New York, April 28th, 1905.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

60 Supreme Court of the United States, October term, 1904.

THE UNITED STATES, PETITIONER,
vs.
EMIL DIECKERHOFF ET AL. } No. 610.

Stipulation.

It is hereby stipulated by and between counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court shall be taken as the return of the clerk of the Circuit Court of Appeals to the writ of certiorari issued herein.

H. M. HOYT,
Solicitor-General.
W. WICKHAM SMITH,
Counsel for Respondents.

April 26, 1905.

(Indorsed:) U. S. vs. Dieckerhoff. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1905. William Parkin, clerk.

61 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. United States, petitioner, v. Emil Dieckerhoff et al. Return to certiorari.

62 (Indorsement on cover:) File No., 19710. Supreme Court, U. S., October term, 1904. Term No., 610. United States, petitioner, vs. Emil Dieckerhoff et al. Writ of certiorari and return. Filed May 1, 1905.

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FILE COPY.

Supreme Court U. S.
FILED
APR 13 1905
JAMES H. MCKENNEY,
Clerk.

No. 610. 228.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
EMIL DIECKERHOFF ET AL. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT AND BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, PETITIONER,
v.
EMIL DIECKERHOFF ET AL. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT AND BRIEF.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit in the above-entitled cause, reversing the judgment of the Circuit Court for the Southern District of New York, and remanding the case for a new trial.

The point involved is an importer's liability upon a bond for the return to the collector of unexamined merchandise, provided for by section 2899 Revised Statutes (set out hereafter), and commonly termed the importer's redelivery bond.

The Circuit Court of Appeals held the Government can only recover damages actually proved, although such proof, by reason of the importer's failure to return the goods, is practically impossible.

This construction defeats the very object of the statute—to protect the United States against mistake and fraud, and is besides repugnant to the decisions of this court and the applicable principles of law and equity.

The Government maintains it is entitled to recover either double the estimated value of the importation—the penalty or forfeiture imposed by the statute, or, as the Circuit Court held, double the estimated value of the package not returned, as liquidated damages under the terms of the bond.

The question is of special importance. If the decision of the Circuit Court of Appeals is correct, administration of the customs will be greatly embarrassed. Under it a redelivery bond affords no reasonable protection, since it is practically impossible to show the damage suffered by the United States when the only adequate evidence of fraud or error—the package itself—has been destroyed by the importer. It would be no longer possible with safety to allow importers to withdraw without examination the bulk of their importations, as has been the practice for years and as the statute contemplates; and the Government would be obliged either to take enormous risks of being defrauded or to erect great warehouses for storing *all* imported goods pending their examination and appraisal.

The practice for many years, fully authorized by law, has been to send to the public stores and cause to be examined one package out of every ten, the others being delivered at once to the consignee, bond

being given. Even this entails an enormous amount of work and expense. If *all* packages must hereafter be examined, it is manifest the result to the Government will be disastrous. And if examination of all be not made, then under the rule laid down by the Circuit Court of Appeals the door to extensive frauds will be wide open. If an importer has only to pay the damage which the Government can show after he has destroyed the only adequate evidence, the temptation to commit fraud will be too strong for universal resistance.

The opinion and judgment of the Circuit Court of Appeals are decisive of the important point in issue, and it appears of great importance to the Government to know *at once*, and without waiting for a technically final adjudication, what the law is, so that the revenues may be properly protected. The real point in issue can be passed on now just as readily as at any future time. At the trial the Government conceded, as hereafter stated, that it could not, the package having been destroyed, prove its damage; so there will be nothing for the Circuit Court to do upon a new trial but to enter judgment for the respondents in accordance with the opinion of the Circuit Court of Appeals.

STATEMENT OF CASE.

December 21, 1896, respondents, copartners in business in the city of New York under the firm name of Dieckerhoff, Raffloer & Co., and their sureties, executed the following bond:

> Bond for six months, to cover the delivery of unexamined packages.
>
> Know all men by these presents that we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.
>
> The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents, and delivered from the custody of the officers of the customs, in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the

officers of the customs; or if the above-bounded obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof.

Sealed with our seals this twenty-first day of December, one thousand eight hundred and ninety-six.

(Sgd.) DIECKERHOFF, RAFFLOER & Co., [L. S.]
By R. ERBSLOB. [L. S.]
(Sgd.) CARL F. BOKER. [L. S.]
(Sgd.) JOHN ACHELIS. [L. S.]

Sealed and delivered in the presence of—
(Sgd.) W. A. COURSEN.

January 13, 1897, respondents imported and entered at the custom-house, New York, seven packages of merchandise, numbered 417 to 421 inclusive, and 983

and 984. At the time of entry the collector designated package No. 418 to be sent to the public stores for examination and appraisal. The remaining packages were delivered in pursuance of section 2899 Revised Statutes and in reliance upon the bond, upon which the collector indorsed the estimated value of the whole importation, $1,522. (R., 13, 14.)

On or about January 18, 1897, and within ten days after package No. 418 had been examined and appraised, the collector ordered respondents to return package No. 420, which they failed to do. (R., 15.)

The United States brought suit upon the bond, praying judgment, in their amended complaint, for $3,044, double the estimated value of the importation. (R., 15.) The estimated value of package No. 420 was alleged to be $185 and of the invoice containing it $806. (R., 14.)

Respondents demurred. (R., 38.) The Circuit Court, Townsend, J., overruled the demurrer, holding that "upon the complaint as it stands plaintiff, unless further answer is made, is entitled to recover, as liquidated damages, double the estimated value of the packages called for and not returned." (R., 39, 41.)

Respondents then answered, denying breach of the bond, and also that by reason of any fact alleged the United States had suffered any damage whatever. (R., 17.)

The case was tried by a jury before Judge Coxe. The United States called as a witness a clerk in the custom-house, who testified, against respondents' ob-

jection, that the value of package No. 420, as estimated from the invoice itself as of the time of the entry, was $184.56. (R., 25.) No further evidence was offered by the Government.

Respondents admitted that the collector called on the importer for the return of package No. 420, and that the same was not returned. (R., 25.) They offered no evidence. (R., 26.)

Counsel for the Government conceded there was no proof that the United States had suffered any damage by reason of respondents' failure to return the package, and that there could be no such proof. (R., 26.)

Motions to direct a verdict for respondents and their sureties having been overruled (R., 27), the United States moved the direction of a verdict in its favor for twice the estimated value of the package not returned, $369.12, which was granted. (R., 27.)

Judgment for the amount of the verdict and costs were entered. (R., 20.)

Upon appeal the Circuit Court of Appeals reversed the judgment and remanded the case for a new trial. (R., 44, 49.)

The majority of that court held the Government could only recover damages proved to have been actually incurred. Judge Wallace was of opinion that the measure of damages was the value of the package not returned. (R., 50.)

THE STATUTES.

There was no provision of law for appraising imported merchandise until 1823. Prior to that time appraisal was made only of goods with no invoice, of damaged goods, or where the collector suspected fraud. (*Greely* v. *Thompson*, 10 How., 225, 235–236.)

The act March 1, 1823, chapter 21, section 15 (3 Stats., 729, 735), required at least one package out of every invoice or every twenty packages to be examined, and if it did not correspond with the invoice or was falsely charged a full inspection was directed. Packages containing any article not described in the invoice were to be forfeited, with power in the Secretary of the Treasury to remit if in his opinion it was done by mistake and not to defraud.

A similar provision was contained in act May 28, 1830, chapter 147, section 4 (4 Stat., 409, 410), which also provided for delivering the packages not held for examination to the importer upon giving a redelivery bond. This is the original of section 2899 Revised Statutes.

The act August 30, 1842, chapter 270, section 21 (5 Stat., 565), provided for examination, forfeiture, etc., and increased the number of packages to be examined to at least one out of every ten—now section 2901 Revised Statutes.

The act July 27, 1866, chapter 284, section 1 (14 Stat., 302), contained specific directions to the collector of the port of New York in regard to examination and appraisement—now section 2939 Revised Satutes.

The sections of the Revised Statutes referred to follow:

SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall in either case be forfeited.

SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified

in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

ARGUMENT.

I.

No question was made below as to the form of the bond in suit. Under section 2899 a separate bond could be exacted upon each entry, but for convenience the Secretary of the Treasury as early as 1857 authorized the taking of a general bond running for six months. By indorsing upon this bond the estimated value of each importation it is transformed into a series of separate bonds with penalties in double the estimated value of the importation, as provided by section 2899 Revised Statutes.

The Government maintains that the sum named—double the estimated value of the importation—is a penalty or punishment imposed by law for violating a duty enjoined by law, and that for a breach of the bond the whole amount may be recovered without proof of damage.

This was the view taken in *Clark* v. *Barnard* (108 U. S., 436), which is believed to control this case. The bond in that case was in the penal sum of $100,000, conditioned that the company giving it should complete its road within a specified time. The court held:

> That the sum named in the bond in question was not a penalty to secure the performance of a condition, which could be discharged on payment of such damages as might be proved to have arisen from nonperformance; but it was in the nature of a statutory penalty for the nonperformance of a statutory duty, and that it

> was not necessary for the State to show any actual damage or injury from the breach, in order to be entitled to recover when the breach was proved.

In that case the whole subject was fully considered, upon principle and authority.

Clark v. *Barnard* was followed by the Circuit Court of Appeals for the Fifth Circuit in *The S. Oteri* (67 Fed., 146, 151). Section 2979 Revised Statutes requires an importer on withdrawing goods for export to give the collector "satisfactory security" that the merchandise shall be landed out of the United States. The Treasury regulations provided that in cases of withdrawal for export the exporter should give bond "with satisfactory security in a penal sum equal to double the amount of the estimated duty on the goods." Held:

> That an export bond given in the sum of $1,000 without containing any reference to the amount of estimated duties on the goods withdrawn was valid, and that the Government was entitled, upon breach of the condition, to recover the whole amount of the bond, and was not limited to a judgment for double the amount of duties as subsequently estimated.

Clark v. *Barnard* was also followed in *Nilson* v. *Jonesboro* (57 Ark., 168, 177), suit upon a contract providing for the forfeiture of a stipulated sum for failure to complete a street railway within a specified time, the entire amount being held to be forfeited, and in *State* v. *Hall* (70 Miss., 678, 682) relating to a county treas-

urer's bond, where the statutory penalty—double the deficit—was held to be recoverable.

In *United States* v. *Montell* (Taney's Cir. Ct. Dec., 47) the court held, as stated in *Clark* v. *Barnard*, that a sum secured by bond with sureties under act of Congress of December 31, 1792, conditioned that the registry of a vessel should be used solely for it and returned to the collector upon certain contingencies, was "a penalty or forfeiture inflicted by the sovereign power for a breach of its laws, not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offense, and not the less so because security is taken before the offense is committed, in order to secure the payment of the fine if the law should be violated." (108 U. S., 458.)

In *United States* v. *Hatch* (1 Paine, 336), Circuit Court, Second Circuit, bond had been given by the master under act February 28, 1803 (sec. 4576, R. S.), conditioned for the exhibition of the list of his ship's company to the first boarding officer at first port of arrival in the United States and production of the crew. The court held the sum named in the bond was intended as a forfeiture and not as a penalty to cover damages assessed, the impossibility of assessing the damages contemplated being pointed out.

In *United States* v. *Pingree* (1 Sprague, 339), District Court, Massachusetts, an additional duty of 100 per cent secured by a bond taken under act of 1854, chapter 30, conditioned for transporting and warehousing an importation, was treated as a penalty imposed

for a violation of law and a verdict for the full amount rendered. Upon motion in arrest of judgment the court held the 100 per cent penalty was on the original duty, but upon appeal the Circuit Court decided it was on the invoiced value of the goods as taken in the bond. (Andrews' Revenue Laws, 102.)

Relief from penalties and forfeitures is peculiarly a matter of equity jurisdiction. Originally there was no remedy at law, but now by statute in England and this country it is otherwise, although some cases not within the purview of the statutes are still cognizable in equity alone. (Story Eq. Jur., sec. 1301.) The ground upon which equity interferes is (Id., sec. 1314)—

> that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof or the damage really incurred by the nonperformance. In every such case the true test (generally, if not universally) by which to ascertain whether relief can or can not be had in equity is to consider whether compensation can be made or not. If it can not be made, then courts of equity will not interfere.

Tested by these principles alone a court of equity would refuse to interfere in this case, for, manifestly, compensation can not be made for the wrong the United States may suffer by breach of importers' re-

delivery bonds. But the case is controlled by another principle (Story Eq. Jur., sec. 1326):

> Where any penalty or forfeiture is imposed by statute upon the doing or omisson of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture if incurred, for it would be in contravention of the direct expression of the legislative will.

This principle was applied in *Clark* v. *Barnard, supra.*

This is an action at law. Respondents contend, however, that section 961 Revised Statutes is applicable.

> SEC. 961. In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, *the court shall render judgment for the plaintiff to recover so much as is due according to equity.* And when the sum for which judgment should be rendered is uncertain it shall, if either of the parties request it, be assessed by a jury.

This statute applies only "where the forfeiture, breach, or nonperformance shall appear by the default or confession of the defendant, or upon demurrer." In this case there was a demurrer, which was overruled, and the respondents afterwards answered denying the breach, but admitted it upon the trial. It is questionable, therefore, whether the statute applies; but assuming it does, the court is directed by it to render judgment for the plaintiff "to recover so much as is due

according to equity." We are therefore relegated to the principles of equity, which, as has been shown, authorize the recovery of the whole penalty in a case like this. Such was the view of section 961 taken in *The S. Oteri* (67 Fed., 150, 151), above cited.

II.

The Circuit Court directed a verdict for the Government for twice the amount of the estimated value of the package not returned. In his opinion overruling the demurrer Judge Coxe held the Government was entitled to recover that amount as liquidated damages. This conclusion was doubtless based upon the fact that the bond provides as an alternative for the return of the packages delivered the obligors shall "pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned."

This condition is not in the statute, but it is not believed to be necessarily void for that reason; certainly not if the penalty fixed by the statute—double the estimated value of the whole importation—is to be treated simply as security for the payment of damages. In that view, the Secretary of the Treasury would be fully authorized to stipulate for liquidated damages, and having fixed upon double the amount of the package not returned as an equivalent, the Circuit Court was justified—proceeding under section 961 Revised Statutes "according to equity"—in holding that sum to be liquidated damages, because of the impossibility of determining the real damage

In support of the authority of the Secretary of the Treasury to stipulate in the bond for liquidated damages, see:

United States v. *Tingey*, 5 Pet., 115.
United States v. *Bradley*, 10 Pet., 345.
United States v. *Hodson*, 10 Wall., 395.
Jessup v. *United States*, 106 U. S., 147.
Constable v. *National Steamship Co.*, 154 U. S., 79.
The S. Oteri, 67 Fed., 146.
Stephensen v. *Monmouth Min. and Mfg. Co.*, 84 Fed., 115.
Grady v. *United States*, 98 Fed., 240.

In *United States* v. *Tingey* the court said (5 Pet., 127):

> It is obvious that the condition of the present bond is not in the terms prescribed by the act of 1812, chapter 47, and is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him and for all public property committed to his care, whether officially as purser or otherwise. Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond voluntarily given to the United States and not prescribed by law is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract or to take a bond in cases not previously provided for by some law. Upon full consideration of this subject we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general

> right of sovereignty; and the United States being a body politic may, within the sphere of the constitutional powers confided to it and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law and appropriate to the just exercise of those powers.

Under the authorities cited, the bond in question, being a voluntary one, if not authorized by the statute, would be good as a common-law bond.

In *Moses* v. *United States* (166 U. S., 571, 586) the court said:

> The consideration or condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se.* Otherwise, and for all purposes of security, a bond may be valid though no statute directs its delivery.

III.

If the condition referred to be not authorized, or in conflict with the penalty named in the statute, the bond is not void even as a statutory bond, but, the condition being severable, the statutory penalty may be recovered.

In *United States* v. *Mora* (97 U. S., 413), the court held:

> Where the conditions of a bond which are not sustainable are severable from those which are, the latter hold good *pro tanto.*

In that case the act of May 20, 1862, authorized the Secretary of the Treasury to require reasonable security

that goods be not transported in vessels to any place under insurrectionary control, nor in any way used in giving aid or comfort to the enemy. The court held a bond taken from a shipper by the collector for that purpose, under the Secretary's regulations, in double the value of the goods shipped, was reasonable security within the meaning of the act.

The court apparently assumed that for a breach of the bond the United States would have been entitled to recover the entire penalty. Manifestly it would have been impossible for the Government to show the actual damage it sustained from the delivery of goods to insurgents.

So here proof of damage is impossible. It was so conceded by the Government at the trial.

IV.

Unless the Government can recover upon redelivery bonds either double the value of the package or packages not returned as liquidated damages, or double the estimated value of the importation as "a statutory penalty for the nonperformance of a statutory duty" (*Clark* v. *Barnard*), such security can no longer be taken, and the purpose of the statute, which is to release the Government from warehousing the entire importation pending examination and appraisal, as well as for the convenience of the importer, will be defeated. This would seem to point to the proper construction of the statute.

HENRY M. HOYT,
Solicitor-General.

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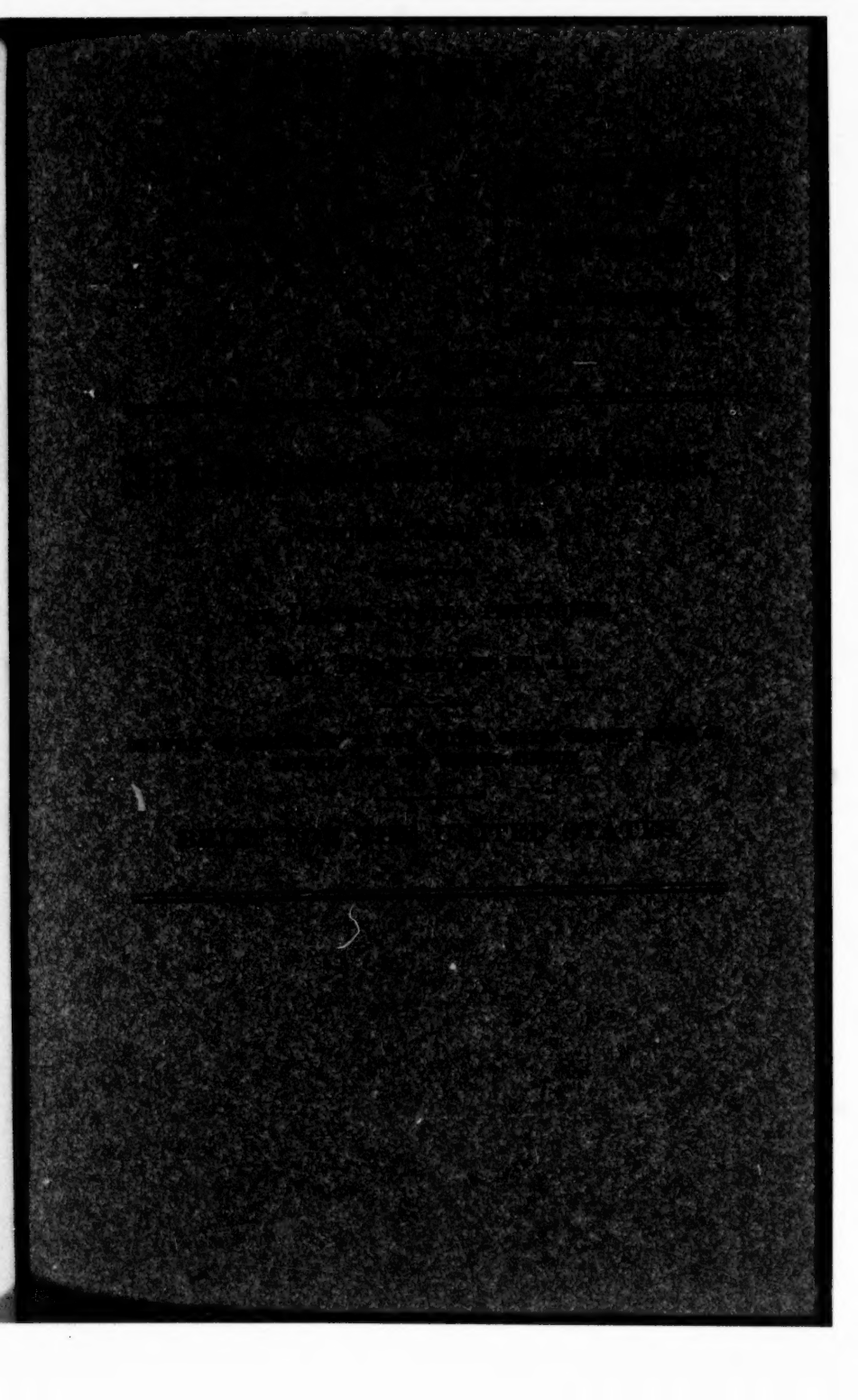

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,
v.
EMIL DIECKERHOFF ET AL. } No. 228.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an action at law brought by the United States on a custom-house or redelivery bond taken by authority of section 2899, Revised Statutes.

Respondents, partners under the name Dieckerhoff, Raffloer & Co., were importers at New York. For their own convenience they voluntarily executed, December 21, 1896, a bond, the essential parts of which follow (R., 12):

> *Bond for six months to cover the delivery of unexamined packages.*
>
> Know all men by these presents that we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the

United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.

The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents and delivered from the custody of the officers of the customs in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States

> that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof. (R., 12.)

On January 13, 1897, they imported per steamship *Bovic* and entered at the New York customhouse 7 packages of merchandise (described in two invoices), numbered 417 to 421, 983, and 984. The collector designated package 418 to be sent to the public stores for examination and appraisal; the others were delivered in pursuance of section 2899, Revised Statutes; and the estimated value of the whole importation ($1,522) was indorsed on the aforementioned bond (R., 13, 14).

On January 18—within ten days after package 418 was examined and appraised—the collector ordered respondents to return package 420. They failed so to do (R., 13). Suit upon the bond was instituted and judgment asked for $3,044—twice the estimated value of the imports. The value of package 420 was alleged as $185, and the value of all the goods included in the same invoice with 420 was stated to be $806 (R., 8).

The Circuit Court overruled respondents' demurrer and held that "upon the complaint as it stands,

plaintiff, unless further answer is made, is entitled to recover, as liquidated damages, double the estimated value of the packages called for and not returned" (R., 19, 20).

An answer was filed denying breach of the bond and also that the United States had suffered any actual damage (R., 9). On the trial before a jury a custom-house clerk testified, over respondents' objection, that the value of package 420, as estimated from the original invoice, was $184.56; and further, that the only indorsement on the bond above set out was "Vessel, *Bovic;* where from, Liverpool; amount, $1,522" (R., 13). It was admitted that the collector unsuccessfully called for the return of package 420. Respondents offered no evidence (R., 13, 14).

Counsel conceded there was no proof that the United States suffered any actual damage by the failure to return package 420, and that no such proof could be made (R., 13).

The court having denied respondents' motion to direct a verdict, directed one in favor of the Government for twice the estimated value of the unreturned package, $369.12 (R., 13, 14).

The Circuit Court of Appeals reversed the lower court and remanded the cause. Two of the judges were of opinion that judgment could be given only for the actual damage which the Government could establish; the third judge maintained that the measure of damage was the value of the package asked for and not returned (R., 22, 26).

STATUTES.

Prior to 1823 no statute provided generally for appraising imports. Appraisals were directed where there was no invoice, of damaged goods, and in cases of suspected fraud. (*Greely* v. *Thompson*, 10 How., 225, 235, 236).

The act of March 1, 1823, c. 21, sec. 15 (3 Stats., 729, 735) required one package out of every invoice and at least one of every twenty to be examined, and if it did not correspond with the invoice or was falsely charged, a full inspection was directed.

A similar provision was in the act of May 28, 1830, c. 147, sec. 4 (4 Stat., 409, 410), which also provided for delivering packages not held for examination upon the giving of a redelivery bond. This is the original of section 2899, Revised Statutes.

The act of August 30, 1842, c. 270, sec. 21 (5 Stat., 565), provided for examination, forfeiture, etc., and increased the number of packages to be examined to at least one out of every ten. It became section 2901, Revised Statutes.

The act of July 27, 1866, c. 284, sec. 1 (14 Stat., 302), contained specific directions concerning examination and appraisement. It became section 2939, Revised Statutes.

The Revised Statutes contain the sections following:

> SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or

until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited.

SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be, shall be liable to

seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

ARGUMENT.

I.

The purpose of Congress, clearly expressed in section 2899, Revised Statutes, is that all imports shall be held pending examination, except when the collector, upon the owner's request, may decide, in view of all the facts presented, that sample packages can be re-

lied on to reveal the nature of all. The collector can not finally decide whether such packages are representative until he has examined them and the attested invoice. To expedite deliveries and favor importers the statute permits them—the collector assenting—to withdraw their merchandise, except the samples, provided bond be given to return the same within ten days if called for. The manifest purpose is to subject *all* the imports to inspection whenever the Government officers conclude that course is proper; and the bond with a heavy penalty is intended to insure the return for scrutiny of what was voluntarily withdrawn.

The redelivery bond taken upon request of the importer is purely voluntary. By means of it goods are withdrawn from custody, and its special function is to secure their return thereto in the original condition when wanted, to be dealt with according to law. Much more is involved than mere pecuniary loss to the Government. The articles may be contraband; they may be necessary evidence to punish perjury; they always furnish the best means of ascertaining values, false descriptions, etc.

Section 2899, Revised Statutes, permits demand for a separate, complete bond for each importation; but this would entail much inconvenience upon large importers, and the Secretary of the Treasury, by regulation dating back to 1857 (Customs Regulations, article 391), allows a general bond upon which the value of any consignment may be endorsed. In the present case all parties voluntarily assented to the

arrangement and the matter stands as if a single bond of like tenor for twice the value of the merchandise had been executed.

Package No. 420 worth, according to the invoice, $184.56, was not returned and admittedly the condition of the bond was broken.

The point in question is, What is the measure of the recovery to be allowed? Four answers have been put forward—

First, the actual loss sustained by the Government, to be shown by proof;

Second, actual value of the unreturned package;

Third, twice the value of the package demanded and not returned;

Fourth, the full penalty of the bond, double the value of the consignment.

The first and second suggestions are based upon the idea that the bond was given alone to secure the Government against money loss, susceptible of estimate, which, being paid, would perfect the real purpose of the arrangement.

In *Clark* v. *Barnard* (108 U. S., 436) this court, after reviewing the authorities and discussing the principles involved, announced a doctrine directly in conflict with such idea. There the State of Rhode Island was permitted to enforce the full penalty of a bond for $100,000 conditioned to complete within a specified time a railroad authorized by statute. The bond was breached but no damage was occasioned to the State or to any of its citizens; and the claim was

that therefore no recovery was possible. Speaking by Mr. Justice Matthews this court said (p. 459):

> The first of these (considerations) is that it was not intended by the parties * * * that the obligation given and accepted should be for an indemnity against any loss or damage expected to be suffered by the State, in the event that the railroad company should fail to build the railroad as required. It is found as a fact that no such loss or damage has in fact ensued. It is equally plain that none could possibly have arisen. * * *
>
> (P. 460.) The conclusion, in our opinion, can not be resisted that the intention of the parties in the transaction in question was that, if the railroad should not be built within the time limited, the corporation should pay to the State, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. * * *
>
> (P. 461.) In the second place, we think that the sum named in the statute is imposed by it as a statutory penalty for the nonperformance of a statutory duty. The obligation required is that the railroad company shall give a bond, with satisfactory security, that they will obey the law; that they will complete their road as required by it.

The opinion in the foregoing case presents an elaborate discussion of the legal questions now involved.

In *The steamship Oteri* (67 Fed., 146, 151) the Circuit Court of Appeals, Fifth Circuit, followed the doctrine announced in *Clark* v. *Barnard*. Section 2979, Revised Statutes, requires an importer withdrawing

goods for export to give the collector "satisfactory security" that the merchandise shall be landed out of the United States. Treasury regulations provide for a bond "with satisfactory security in a penal sum equal to double the amount of the estimated duties on the goods," and one was given for a thousand dollars without referring to amount of duties. The court held "that the said bond is not one in which equity, under the facts admitted, can relieve the obligors from payment of the full penalty stipulated."

See also—

Smythe v. *United States*, 188 U. S., 156.
Nilson v. *Jonesboro*, 57 Ark., 168, 177.
State v. *Hall*, 70 Miss., 678, 682.
United States v. *Montell*, Taney's Cir. Ct. Dec., 47.
United States v. *Hatch*, 1 Paine, 336.
United States v. *Pingree*, 1 Sprague, 339.
Andrews' Revenue Laws, 102.

One may not complain that a judgment against him is less than the law allows. If, therefore, accepting the third answer above specified, the court gave judgment for twice the value of the sample package when it should have been double the value of all, such action must be affirmed.

The bond actually executed in the present case (R., 12) contains a clause providing "or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of mer-

chandise not so returned, then this obligation is to be void."

In view of that clause and the indicated understanding of the parties I submit the Government pursued the proper course by asking judgment for only twice the value of the package called for. (R., 13, 14.) That was clearly just.

But if the bond as executed had strictly followed the language of section 2899 I further submit that under the authority of *Clark* v. *Barnard* the Government would have been entitled to demand a judgment for twice the estimated value of the goods in the invoice which contained the unreturned package. (Secs. 2901, 2939, R. S.)

It is clearly established that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions when there can not be any just compensation.

Story Eq. Juris., §§ 1324, 1326.
Pomeroy Eq. Juris., § 381.

II.

The clause authorizing discharge of the bond upon payment of double the estimated value of any unreturned package is not specifically provided for by section 2899, Revised Statutes; but it is not prohibited and, being less onerous than what might have been demanded, one who voluntarily assented thereto may not complain on that account.

Moses v. *United States* (166 U. S., 571, 586):

> The consideration or condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid though no statute directs its delivery.

The Secretary of the Treasury or his agent, the collector, has authority to take common-law bonds and to stipulate for liquidated damages therein.

United States v. *Tingey*, 5 Pet., 115.
United States v. *Bradley*, 10 Pet., 343.
United States v. *Hodson*, 10 Wall., 395.
Jessup v. *United States*, 106 U. S., 147.
Constable v. *National Steamship Co.*, 154 U. S., 79.
The S. Oteri, 67 Fed., 146.
Stephenson v. *Monmouth Min. & Mfg. Co.*, 84 Fed., 115.
Grady v. *United States*, 98 Fed., 240.

In *United States* v. *Tingey* the court said (5 Pet., 127):

> It is obvious that the condition of the present bond is not in the terms prescribed by the act of 1812, chapter 47, and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him and for all public property committed to his care, whether officially, as purser, or otherwise. Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond, voluntarily given to

> the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion, that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.

If the clause permitting payment of twice the value of an unreturned article is invalid the defect is cured by those provisions in the bond which follow the language of the statute. The conditions being severable, the authorized one is good. (*United States* v. *Mora*, 97 U. S., 413.)

III.

Two points heretofore made in behalf of respondents and which may be further relied upon may be properly noticed.

It is maintained that *Clark* v. *Barnard* and similar cases are not controlling because they had reference to bonds or statutes wherein the amount to be recovered

was absolutely fixed, while in the case at bar the agreement of the parties was that the collector should estimate the value of each importation and that twice such estimate should be the penalty. In other words, it is said that here no statute or agreement under seal fixes the punishment, but that a customs officer estimates the value as he pleases and thereby fixes a statutory penalty for violation of law. Respondents conclude no statute can ever be passed in this country which will provide such punishment, and that no sane parties will ever contract for any such thing.

Section 2899, Revised Statutes, expressly provides that the penalty of the bond shall be double the estimated value of the merchandise. It is apparent, therefore, Congress intended the estimates should govern. The bond is purely voluntary and to be made after the valuation is fixed. If the importer does not wish to incur the penalty he is at perfect liberty to leave the goods in custody; and after having withdrawn them he can escape liability by returning them, unopened, upon demand, as the law requires. The very purpose of the bond is to insure such return, and for that reason the penalty is made large.

Respondents further claim that they are protected against a judgment for the full penalty by the Revised Statutes, which provide:

> Sec. 961. In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperform-

> ance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury.

A harsh remedy is not necessarily inequitable and a court of chancery will not for that reason alone refuse to enforce it. Experience has demonstrated that mild treatment does not always secure obedience to law.

Section 961, R. S., is substantially in the language of section 26 of the judiciary act of 1789 (1 Stat., 87). It is expressly confined to three cases—default, confession, or demurrer—and has no application where there is a trial upon pleadings and proof.

Farrar v. *United States*, 5 Pet., 373, 385.

Ives v. *Merchants Bank*, 12 How., 159, 164.

The enactment was occasioned by the old doctrine under which a court of law always gave judgment for the full penalty of the bond when any breach was shown, and its purpose is to permit relief in proper cases without a proceeding in equity. Whenever, therefore, under equitable rules no relief from a penalty would be given, section 961 can have no application.

When any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act then a court of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be

in contravention of the direct expression of the legislative will. (Story Eq. Juris., § 1326.)

Clerk v. *Barnard* seems to make it entirely clear that a court of chancery would not interfere with enforcement of the penalty provided in the bond sued on in the present case.

I respectfully ask that the action of the Circuit Court of Appeals be overruled and the judgment of the Circuit Court be affirmed.

J. C. McREYNOLDS,
Assistant Attorney-General.

MARCH, 1906.

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No. 610.

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

THE UNITED STATES,
Petitioner,

vs.

EMIL DIECKERHOFF ET AL.,
Respondent.

No.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES CURIE,
W. WICKHAM SMITH,
Attorneys for Respondent.

W. WICKHAM SMITH,
Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

THE UNITED STATES,
Petitioner,

v.

EMIL DIECKERHOFF *et al.*,
Respondents.

No.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

An examination of the record in this case, and of the petition now filed by the Solicitor-General will disclose to the Court the fact that the Government has never been able to quite make up its mind what relief it is entitled to. It insists that the Court of Appeals gave the wrong construction to the bond and the statute under which it was given, but hesitates to take any stand as to what is the proper construction of the bond and of the statute. It originally sued for double the estimated value of the package not returned (Record, fol. 24). Subsequently, it amended its complaint and sued for double the value of the importation (Rec., fol. 45).

The Solicitor General in his petition now states that the Government is entitled to recover either double the estimated value of the importation, or double the estimated value of the package not returned, as liquidated damages under the terms of the "bond" (Petition, p. 2). But later on he states (p. 11), "The Government maintains that the sum named—double the estimated value of the importation—is a penalty or punishment imposed by law for violating a duty enjoined by law." Here there is nothing said about liquidated damages.

No court can have been guilty of very grave error which has decided that a suitor who could not make up his own mind what relief he was entitled to was not entitled to any at all.

The bond in question provided (Rec., fol. 38) that "the Collector of Customs aforesaid shall endorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid."

Here we have a bond expressly providing for a penalty, calling it by that name, and yet the Government contends that an amount not fixed in the bond, but to be estimated by a subordinate government official, after the bond has been made and executed, shall be treated as liquidated damages. This is contrary to the decision of this Court in Tayloe *vs.* Sandiford (7 Wheat., 11) where Chief Justice Marshall said:

> "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated

> damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting party. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention."

In discussing the statute and the bond the learned Solicitor-General seems to assume that the only possible breach of the condition of the bond would be an absolute failure to return a package. But, under the statute and the bond, it is just as much a breach of its conditions if the package is returned intact and has never been opened, except in the presence of customs officers, but without the Collector's consent; or has been opened with the express consent of the Collector, but not in the presence of customs officers. If the Government claim be correct, an importer who has obtained the consent of the Collector to the opening of packages and can prove by twenty-five witnesses that, after being opened, they were nailed up without the removal of any of their contents, may be mulcted in the full penalty of the bond, because no officer of the customs happened to be present at the time of the opening. Is this contention worthy of being made the subject of argument in this Court?

It is unnecessary to review the numerous authorities cited by the Solicitor-General, where it has been held that the amount named in a bond or statute was a penalty or punishment imposed by law for violating a duty enjoined by law. The fundamental difference between these cases and the case at bar, which the Solicitor-General overlooks, is that in the bonds or statutes referred to in such decisions the amount

o be recovered was absolutely fixed, whereas, in the case at bar, the agreement of the parties was that the Collector should estimate the value of each importation, and that double the value so estimated should be held to be the penalty of the bond. In other words, his contention in this case is not that a statute fixes a punishment, or that an agreement under seal fixes a punishment, but that an officer of the customs can estimate the value of an importation at any amount he pleases, and that double that amount is to be treated as a statutory penalty for violation of law. It is safe to say that no statute can ever be passed in this country which will provide such a system of punishment, and that no parties of sound mind and competent to contract will ever contract for anything of the kind.

The whole burden of the Solicitor-General's argument is that unless the Government can recover on these bonds without proof of damage it will never be able to recover on them at all, because the failure to return the goods leaves them without any proof of damage, and that therefore the Government will either have to leave the door open for fraud or examine all the goods of every importation. This argument might have some weight if it were invoked as to a recent enactment, but the statute in question has been in force for 75 years, and the Government has managed to collect its revenues without examining all the packages in every importation during this period, and it was not until the beginning of the present suit, so far as can be learned, that the claim that the Government could recover on these bonds without proof of damage was ever made. The learned Solicitor-General seems to be unduly alarmed.

It is, of course, incorrect to say that a failure of an importer to return a package leaves the Government powerless to prove fraud in an importation.

In the case of recent prosecutions for fraud on the revenue in the City of New York, the Government proved, by overwhelming evidence, in January, 1904, that packages which had been delivered to the importer in the spring of 1901 contained goods differing in quality, quantity and value from those described in the invoice. The entire argument of the Solicitor General is disposed of by the following language of the opinion of the Circuit Court of Appeals:

> "With the package in their possession it is a very easy matter to ascertain its contents, but such information may be obtained otherwise. The persons who packed it or saw it packed, the persons who unpacked it or who took possession of its contents could show what those contents were. It might be an expensive matter to procure this testimony as to any missing package, but the penalty of the bond is large enough to cover such expenses and all additional duties besides—these are the damages which the Government sustains by reason of the non-return of the package, and in our opinion the bond is conditioned to make good such damages within the limit named in the penalty—double the estimated value of the importation."

Not only do Courts generally view with disfavor demands to collect penalties, but the laws of the United States contain an express provision forbidding such a course. Section 961 of the Revised Statutes provides that in a case like this "the Court shall render judgment for the plaintiff to recover so much as is due according to equity." The learned Solicitor-General seeks to meet this statute by saying that the collection of double the value of nine-tenths of an importation for failure to return one package unopened is equity. The obvious an-

swer is that if this be equity what would be left for the term inequity to apply to?

I cannot better conclude this brief response than by quoting the concluding paragraph of the opinion of the Circuit Court of Appeals:

> "The argument that great hardship might result from any particular construction of an Act of Congress is not usually of much weight, but it may fairly be considered that if the sum named in the bond were held to be liquidated damages, an importer might not infrequently be fined $50,000 or $100,000 when his importation was a large one, merely because he had opened a single package worth maybe $100 in the presence of an inspector, but without the written consent of the Collector or Surveyor."

The petition should be denied.

New York, April 12, 1905.

Charles Curie,
W. Wickham Smith,
Attorneys for Respondent.

W. Wickham Smith,
Counsel.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 228.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

THE UNITED STATES,

Petitioner,

vs.

EMIL DIECKERHOFF ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS.

W. WICKHAM SMITH,
JOHN K. MAXWELL,
Attorneys for Respondents.

W. WICKHAM SMITH,
Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, Petitioner, vs. EMIL DIECKERHOFF, *et al*, Respondents.	No. 228.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Brief for the Respondents.

The facts in this case seem to be fairly and fully stated in the brief for the United States, and there is nothing special to add to them. Attention is called to the fact admitted at the bottom of page 3 of the Government's brief that the respondents demurred to the complaint herein, whereupon it was, we insist, the duty of the Court to determine how much was due according to equity under the provisions of Section 961 of the Revised Statutes cited at the bottom of page 15 of the petitioner's brief.

Much of the petitioner's brief is devoted to a discussion of whether the respondents can set up that

the bond was not in accordance with the statute, and whether the United States had a right to exact a bond not in strict conformity with the statute. These questions need not be discussed here. Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the Collector to enforce it in its form as made. For the purposes of this argument we concede that it was a voluntary bond enforceable according to its terms, and that there has been a breach.

The only question in the case is what does the bond provide. What did the parties to it agree to? What was the obligation they voluntarily assumed? This, we insist, is to be determined primarily from the language of the bond itself, the statute to be resorted to only so far as it may throw light upon any question left in doubt by the terms of the bond itself. Our contention is that the parties agreed only to have certain amounts fixed as penalties to mark the maximum amount which the United States could recover from them, but that it was within the contemplation of all parties at the time of the execution of the bond that the United States could recover for nothing but actual damage sustained by it, to be alleged and proved.

In considering this question it is certainly proper for the Court to take into consideration the fact that although this statute was passed nearly three quarters of a century ago, it has not been the practice to attempt to enforce these penalties. It is not, of course, contended that any legal estoppel exists against the Government by reason of this long continued construction of a statute, but it is most respectfully insisted that the fact that claims of this

character have not been made before is entitled to considerable weight in determining any doubtful questions when they are made at this late day. Not only has it been the disposition of all courts to refuse to enforce penalties in cases where those nominally entitled to enforce them have suffered no damages, but in the law of the United States this disposition is re-enforced by Section 961 of the Revised Statutes, which provides as follows:

> "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the Court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

The Circuit Court upon the hearing of the demurrer to the complaint herein should have proceeded under this statute, and as it would then have appeared (as it has since appeared by the concession in open court of the appellants in error) that they had suffered no damage or at least could prove none, this would have put an end to the litigation. Such was the view of Judge Wheeler when, in the case of U. S. *v.* Duys (112 Fed. Rep., 875) in a suit on a warehouse bond, he sustained a demurrer to the complaint.

The question whether a provision in a contract for the payment of money on the breach of an agreement shall be treated as a penalty or as liquidated damages is one which has occupied the attention of the courts in innumerable cases, and a brief might easily devote 20 pages simply to the citation of authorities in the courts of England, and of the United States Federal Courts and the courts of the several

States. But I do not deem it necessary to extend this brief or take up the time of the Court for any such purpose. It seems to me that the question whether the Government can recover in this case is a simple one under the authorities in the several Courts, and to a few of those which seem to me to lay down the correct principles applicable to this case, I shall confine myself.

In the case of Taylor *vs.* Sandiford (7 Wheat., 11), Chief Justice Marshall said:

> "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting party. *Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the Court to say that their own words do not express their own intention.*"

Let us apply this principle to the case at bar. The bond signed by these parties provides as follows:

> "The penalty of this bond shall be held to be double the value of each importation as made and endorsed as aforesaid."

The proof in the case shows that these bonds are drawn up by the Collector and are contained in a book kept in his office (fol. 73). It is quite evident that the Government officer who drew the bond considered this stipulated sum as a penalty, and it

is equally clear that the parties who signed the bond considered it to be exactly what the Collector had chosen to call it.

In the case of Van Buren *v.* Digges (11 How., 461), the Supreme Court said:

> "The term 'forfeiture' imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. *Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz., that of a penalty.*"

See also,

Watts *v.* Connors, 115 U. S., 353.
Bignall *v.* Gould, 119 U. S., 495.
Chicago House Wrecking Co. *vs.* U. S. 106 Fed. Rep., 385.
Manufacturing Co. *v.* Camp. 65 Fed. Rep., 794.

The statute providing for these bonds says that in case of a failure to return the packages, the bond shall be forfeited. The parties who signed this bond said that the penalty should be double the value of each importation. Neither the statute nor the bond contains any reference to liquidated damages.

But laying aside for the time being the language of the bond or of the statute, let us consider what is the object of the statute and of the bond. If all imported merchandise were retained in the custody of the Collector until after the examina-

tion of the merchandise and invoice were fully completed, the Collector would have a lien on the goods for his duties, and the actual custody of the goods, to make seizure of them in case there were any fraudulent undervaluation or other attempt to defraud the revenue. If the duties were not paid, in the absence of fraud, the goods could be sold, the duties and expenses satisfied, and the balance paid over to the importer. If the goods were forfeitable for fraud, the United States could proceed *in rem*, obtain a judgment of confiscation and sell the goods. In the one case the Government's claim for duties would be fully satisfied. In the other, it would have recovered 100 per cent. of the value of the importation. Shall it be held that the bond was intended to give the Government more than this? Apparently, both the counsel for the Government, and the Circuit Court, could not go to the extent of holding that it did, and so the Court tried to substitute a more equitable contract, which, however, the parties never made. If the bond is to be enforced in accordance with its terms, irrespective of any loss or damage sustained by the United States, then a mere failure to return a package or even the inadvertent opening of it without a permit in writing, although it were immediately nailed up and returned intact to the Collector, would entitle the Government, even in the absence of any fraud, to recover either 180 or 200 per cent. of the value of the importation. For, as the Government retains 10 per cent. of the merchandise and delivers 90 per cent., and the penalty is double the value, if what the collector endorses on the bond is the value of the 90 per cent. delivered, an enforcement of the penalty would give the Government 180 per cent. of the value of the importation. And if (which is apparently the case) the total value of the importation is endorsed on the bond, the enforcement of the penalty would give the Government 200 per cent.

of the value of the importation, notwithstanding the importation was absolutely honest, and no fraud, irregularity or damage was either alleged or proved. Is there anything in this writing which is now before the Court for construction which sanctions the belief that either the party who took this bond or the parties who signed it ever contemplated any such result? We submit there is not.

It is sought by the Government to bring this case within a certain class of exceptions to the rule that the penal sum named in a bond shall be treated as a penalty and that the plaintiff shall recover only the amount of actual damage. One of these exceptions is a class of cases where the courts have treated the amounts stipulated in the bonds as statutory penalties for the non-performance of statutory duties. The leading case on this subject is Clark *vs.* Barnard, 108 U. S., 436. In that case a railroad company had received permission in the State of Rhode Island to construct an extension of their line within the State. The act granting the authority contained the following provision:

> "This act shall not go into effect unless the said Boston, Hartford and Erie Railroad Company shall, within ninety days from the rising of this general assembly, deposit in the office of the general treasurer their bond, with sureties satisfactory to the Governor of this State in the sum of one hundred thousand dollars, that they will complete their said road before the first day of January A. D., 1872."

The condition was not complied with and suit was brought for the amount of the bond. This Court held that the State was entitled to recover on two grounds: First, that it was not intended by the parties that the bond should be for an indemnity against any loss or damage expected to be suffered by the State in the event of the railroad company

failing to build the railroad as required, it being plain that no such loss or damage could possibly have arisen. This ground is clearly inapplicable to the case at bar, as it is plain that damage might and could arise to the United States if merchandise were allowed to go into consumption without examination or appraisal, and that it was the intention of the bond to guard against such loss. The second ground upon which this Court based its decision is thus stated by the Court:

> "In the second place, we think, that the sum named in the statute is imposed by it as a statutory penalty for the non-performance of a statutory duty. The obligation required is that the railroad company shall give a bond, with satisfactory security, that they will obey the law, that they will complete their road as required by it. The language evidently means that, in case they fail to do so, they shall forfeit and pay the sum named; and, in order to insure its payment, additional parties to the bond, as sureties, are required. It is admitted that if it does not mean this it does not mean anything, and we have already said that we are not at liberty to adopt that alternative."

It will be noted that in this case the sum named in the bond was named in the statute, and, in view of the fact referred to by the Court that no damage susceptible of proof could be sustained by the State, it was clear that, if the statute did not mean that the sum named should be paid for the breach of duty, it did not mean anything. In the case at bar there is no sum named in the statute, nor any basis suggested for the mathematical determination of the sum to be stipulated in the bond. The bond is to be "for double the estimated value of the merchandise." The estimation is made by the collector. To apply the rule of Clark *vs.* Barnard to these ten-day bonds would be to hold that the

collector himself might in each instance fix the amount of a penalty which should be inflicted upon the importers in case for any reason, except the act of God or the public enemy, they fail to comply with the conditions of the bond. This Court clearly did not intend to lay down any such rule.

Another authority relied upon by the United States is that of The S. Oteri, 67 Federal Reporter, page 146, in which the United States was allowed to recover the penalty of an exportation bond. In that case the Court held that the bond in question was one in no respect given to secure the payment of duties, but was one authorized and required by the statute for the purpose of preventing fraud on the revenues. It had been proven upon the trial that the obligors of the bond had, in fact, committed a fraud upon the revenues and had attempted to deceive the customs officers. The revenues had been, in fact, defrauded, and the Court said: "We are of opinion that the said bond is not one in which equity, *under the facts admitted*, can relieve the obligors from the full penalty stipulated."

In the case at bar there is no allegation that the United States was defrauded, or that any attempt was made to defraud it by anybody, or that anybody had been guilty of any intentional wrongdoing, or even of any neglect or carelessness.

The attention of the Court is especially invited to the case of U. S. *vs.* Cutajar, 59 Fed. Rep., 1000. In that case the United States sued for the full penalty of a bond given to produce a certified invoice under Section 4 of the Customs Administrative Act. They were allowed to recover under the terms of a bond (which expressly stipulated therefor) the balance of duties unpaid, but were defeated in their attempt to recover the full penalty in the bond. Judge Brown said:

> "In the next place, the statute does not prescribe the amount of the bond. *It leaves*

> *it to be regulated by the Secretary of the Treasury.* I think it is hardly consistent with the general purpose of such legislation or a proper construction of the law, to suppose that the Secretary of the Treasury was intended to fix, by a mere arbitrary regulation, a positive penalty as liquidated damages which the citizen must pay because an authenticated invoice might not be produced within a specified time. In this case the bond itself is not even in exact compliance with the regulation. Its amount is in excess of the regulation. The bond was made greater than 'double of the duties,' as estimated, without the authority of the collector, and as a mere matter of convenience in practice by the clerk who administered this business to take the nearest even hundred. It cannot be that the power to inflict a penalty as such, or to fix liquidated damages in that manner, irrespective of what might be the government's loss, could be sustained. But it is reasonable and consistent enough if *the amount thus fixed for the bond is recorded merely as a limit, and for the purpose only of securing to the government the payment of what shall eventually prove to be due to it.*"

This case was taken on appeal to the Circuit Court of Appeals, whose decision will be found in 67 Fed. Rep., 530. From the opinion of Judge Lacombe we quote the following:

> "The case at bar is not within the authorities cited on the brief of plaintiffs in error" (and the reference to the statement of facts in the report of the case below, 59 Fed. Rep., will show that all the authorities here cited were relied on by appellants in that case), "which hold that where the sum named in the bond is a *fixed penalty imposed by law* as a punishment for a breach of duty enjoined by law, the Court will not undertake to alter or refuse the penalty which *the Legislature has fixed* for the non-performance of a statutory duty. *Congress has not fixed the penalty.*"

These remarks are entirely applicable to the case at bar. In Section 2899, Congress has not fixed the penalty. There is no penalty fixed by law. The penalty of the bond is fixed by the collector and was intended to be only a maximum sum to limit the liability of the obligors, the actual sum to be recovered from them being only the amount of damage sustained by the Government.

In the case of U. S. *vs.* Hatch, 1 Paine, 336, and U. S. *vs.* Montell, Campbell's Reports, 47, the amount of the penalty was fixed in the statute, and it was very properly held by the Court that it amounted to a statutory penalty just as though the statute had said that any one who violated it should be subject to a penalty of $400, without providing for any bond at all.

In the case of U. S. *vs.* Pingree, 1 Spr., 339, the language of the statute was:

> "And for a failure to transport and deliver within the time limited any such bonded goods, wares and merchandise to the collector at the designated port, there shall be levied and collected an additional duty of 100 per cent., which additional duty shall be secured by such bond."

It seems hardly necessary to point out the distinction between a statute which says that an additional duty of 100 per cent. shall be levied and collected, to be secured by a bond, and a statute which provides for a bond indeterminate in amount to be fixed by a Government officer, and says that in case of breach the bond shall be forfeited. The Court expressly called attention to the difference between this language and that of the Act of 1846 (9 Stat., 53), which provided that a bond should be given for double the duties, and said: "Under this Act [1846] if the goods were not rewarehoused *the utmost the government could recover was double the duties,*

and as the bond could be chancered the Court could direct a sum to be paid less than the penalty."

The suggestion was made upon the argument below that the object of Congress in providing for this bond was not compensation, but punishment. We submit that such a view would be in the highest degree unreasonable. Statutes providing punishments do not leave the amount of the punishment to be determined by subordinate executive officers. The determination of a degree and form of punishment for violation of law is a judicial function, and even in the hands of judges is limited by the terms of the statute within certain maximum and minimum limits. Section 6 of the Customs Administrative Act provides that for making a false declaration on entry an importer may be fined $5,000. Section 9 of the same act provides that, for presenting a false and fraudulent invoice or paper, or making fraudulent entry, or being guilty of any willful act by which the United States may be defrauded, the guilty party may be fined $5,000. To view the statute now under consideration as a punitive statute would make the degree of punishment dependent not upon the degree of guilt, but upon the size of the importation. In the case of the disposal of goods willfully, with intent to prevent examination at the Custom House, the amount recovered as punishment might be $200 if the value of the importation was one-half that sum; whereas, in the case of the accidental opening of a single package out of an importation worth $100,000, the punishment might be a forfeiture or recovery of $200,000. To give the statute such a construction as this would be to work an injustice which would shock the moral sense.

It will be noted that in the matter of giving this bond, the entry is treated as a whole. Large importing dry-goods houses might bring in on one entry 100 cases of merchandise of widely different

kinds. Some cases might contain pins, others, embroideries; others, silks; some, dress goods; some, laces; some, fancy articles. Let us suppose that, out of the whole 100 cases, five cases contained embroideries. After examining one of these which had been sent to the Public Stores, demand is made for the other four cases of embroideries. If the importer is unable to furnish these or any one of them he is under the Government's construction to forfeit double the value of the whole importation, 95 per cent. of which is of an entirely distinct and different class of merchandise from that which he has been called upon to deliver up. To suppose that the persons who became sureties on these bonds ever contemplated assuming any such liability as this is, we submit, a most extravagant hypothesis. No such construction should be given to a law if there is the slightest possibility of giving it any other construction.

The statute under which these bonds are given was enacted in 1830. The volume of importation at that time as compared with the present was comparatively insignificant. It was doubtless then practicable for the Appraiser to return invoices within two or three days of the time of entry. At the present time ten days would be considered a short time for the return of an invoice, and in many instances they are held up for weeks and months. To subject parties to a forfeiture of double the value of their merchandise, if during this long period a single case has been opened, notwithstanding no one has been damaged thereby, would be to inflict a blow upon commerce which would stagger the community. Note that the bond is to keep the goods for ten days after the appraiser returns the invoice. Suppose the entry should be liquidated promptly upon the return of the invoice, so that the whole transaction is practically closed, and that four or five days after the liquidation a

demand is made for a package which cannot be delivered, is it not monstrous to suggest that this would warrant a forfeiture of double the value of the importation? Yet, if the Government is correct in its contention here and a suit were brought to recover the full penalty of the bond any suggestions as to inequity might be met by the answer of Shylock, "Give me my bond, give me my pound of flesh." It seems almost incredible that such a claim should be seriously made in the year 1904 in a court of justice.

There is no force in the suggestion that the delivery of the goods to the importer deprived the Government of all evidence by which it could establish the amount of damage it had sustained. Litigations involving thousands of dollars are decided in the Circuit Court almost every day where the kind, character and quantiy of merchandise contained in packages is established by evidence long after the goods have been consumed. The cases containing these goods are only one kind of evidence by which to establish the character of the goods. Many cases will be found in the books where the character of imported merchandise in suits by the Government for forfeiture or duties has been established by the testimony of informers and by the testimony of foreign shippers, by documentary evidence and in many other ways. It may be harder to get this other kind of evidence than it would be to open the cases if they could be produced, but this is no reason for giving a harsh and unreasonable construction to a statute seventy years after its enactment. If punishment is the end to be sought and there is any evidence to indicate that the cases were fraudulently packed or invoiced, ample punishment can be secured against the guilty parties under Section 9 of the Customs Administrative Act or Section 3082 of the Revised Statutes or other provisions of law, without im-

posing harsh and unconscionable punishment upon innocent parties under a novel, strained and unreasonable construction of Section 2899.

The judgment should be affirmed.

Dated New York, April 7th, 1906.

W. WICKHAM SMITH,
JOHN K. MAXWELL,
Attorneys for Respondents.

W. WICKHAM SMITH,
Counsel.

Supreme Court of the United States.

No. 228.—October Term, 1905.

The United States, Petitioner, vs. Emil Dieckerhoff et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 14, 1906.]

Mr. Justice Day delivered the opinion of the Court.

An action was brought in the Circuit Court to recover upon a certain redelivery bond purporting to be executed under cover of section 2899, Rev. Stat. U. S. The respondents, principals on the bond, were partners, as Dieckerhoff, Raffloer & Co. Achelis and Boker executed the bond as sureties. On January 13, 1897, Dieckerhoff, Raffloer & Co. imported by the steamship Bovic certain merchandise which was entered in the New York custom house and consisted of seven packages. These were described in two invoices and are numbered 417 to 421, 983, 984. Package No. 418 was designated by the collector to be sent to the public stores for examination and appraisal; the others were turned over to the importer under section 2899, Rev. Stat. The estimated value of the entire importation, $1,522, was indorsed on the bond. Within ten days after the examination and appraisal of package No. 418 the collector ordered respondents to return package No. 420. This package was not returned. Thereupon suit was instituted upon the bond. A demurrer to the complaint was overruled, and an answer was filed denying breach of the bond and also that the United States had sustained any actual damages. At the trial a customs clerk testified as to the value of package No. 420, estimated from the invoice, that it was $184.56; that the indorsement on the bond was: "Vessel, Bovic; where from, Liverpool; amount, $1,522." It was conceded that the collector had called for the return of the package, that the same was not returned and respondents offered no evidence. Counsel for the United States conceded that there was no proof in the case that the United States had suffered actual damage, and that they could make no such proof. Over the respondents' request for a verdict in their favor the Circuit Court directed a verdict in favor of the Government for $369.12, being twice the estimated value of the unreturned package. The Circuit Court of Appeals reversed this judgment.

The sections of the Revised Statutes pertinent to be considered are:

"SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector, may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited.

"SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be shall be, liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

"SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

The bond was in the sum of fifty thousand dollars, and conditioned as follows:

"The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents and delivered from the custody of the officers of the customs in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined, have been appraised and reported to him, be returned to the order of the collector without having been

opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

"And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof."

Upon the facts stated the question is, How much, if anything, can the Government recover upon this bond? That there is difficulty in the solution of the question is found in the different suggestions put forward; that the actual damages sustained by the Government may be recovered, which is the contention of the respondents, and was the view of a majority of the Circuit Court of Appeals; second, the actual value of the unreturned package, which was the view sustained by one judge of the Circuit Court of Appeals; third, twice the value of the package not returned, which was the view of the Circuit Court; fourth, double the value of the consignment, which seems to be the present contention of the Government.

It may be admitted that the bond does not follow in strict terms the provisions of section 2899, which seems to require, or at least to authorize, a bond in double the estimated value of the merchandise imported, with a condition that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The statute further provides that if in the meantime any package should be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond; in either case it shall be forfeited. The bond given, while it was for a period of six months, in the sum of $50,000, provided that the collector of customs should indorse on the bond the estimated value of each importation and the date thereof, and that the penalty of the bond should be double the value of each importation as so made and indorsed, which in this case would make the penalty $3,044. This bond contains the condition that if the obligors, in lieu of the return of the package, pay to the proper collecting officer double the value of the package or packages not so returned then the obligation is to be void.

While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter to the statute and is neither *malum prohibitum* nor *malum in se*, it is a valid bond, although not in terms directly required by the statute. (*Moses* v. *United States*, 166 U. S. 571, 586.) Indeed the learned counsel for respondents concedes that such a bond can be taken, and in his brief says: "Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the collector to enforce it in its form as made. For the purposes of this argument we concede that it was a voluntary bond, enforceable according to its terms, and that there has been a breach."

But we think this something more than a mere voluntary bond. The statute authorizes, it is true, a more stringent undertaking, for literally it authorizes a bond in double the value of the merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. And further provides that if, in the meantime, any package shall be opened, except in the presence of the collector in the in the manner provided, or if the package is not delivered to the order of the collector, according to the condition of the bond, it shall in either case be forfeited. With this ample authority to take a more enlarged undertaking we think it was within the power of the collector to take the bond in suit, which, taken together, provides for the return of any required package in an unopened condition or the payment of double its value as a condition of being discharged from the full penalty of the bond. There is nothing in this bond which runs counter to the statute, and it is within the authority conferred to take a bond which should be forfeited if the package was not returned in the manner required. Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a package by paying double its value, when a bond in double the value of the merchandise to be forfeited for the non-return of a package unopened might have been required.

The real question in the case, then, is what, if anything, can be recovered under the circumstances shown, on the obligation incurred in this bond? It is the contention of the respondents that the United States can recover only for actual damages which it has shown that it sustained, and that it was not the purpose of the statute or the obligation of the bond given to enlarge the liability beyond such damages as the Government shall be able to allege and prove. But we think the purpose of the statute and the purpose of the requirement in the bond provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer availed

himself of the privilege of withdrawing merchandise from the custody of the Governmental officials before it has been examined and appraised. It is the right of the Government to examine merchandise imported from foreign countries and ascertain its value for the purpose of fixing the amount of duties collectible thereon. It has the right to hold this merchandise until this purpose can be effected. Obviously, in a country where the business of importing goods has become so vast, as is now the case in United States, it would be impracticable to store all goods and hold them until examination. The law has, therefore, provided for the detention usually of one package in ten of an importation, and given the privilege to the importer of removing the rest of the goods, but to be held intact subject to the right of the Government, if an examination of the packages ordered for inspection shall suggest such course, to require that other packages be returned intact for examination, and if this statutory duty is not performed, we think it was the intention of the law to provide specific damages to be recovered upon the nonperformance of the duty imposed, and to secure a prompt and faithful discharge of which the statute provides for the giving of a bond.

In carrying out this purpose we hold the law permitted the taking of such a bond as was given in this case, providing that if the party did not return the package required he should pay double the amount of the value thereof. We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, was intended to and does relieve the Government from the necessity of showing any actual damage or loss. It is suggested that the Government may prove the damages sustained possibly by the testimony of informers or of those who packed the merchandise before shipment, and in other ways. But in our opinion it was the purpose of this statute, and the bond executed in the case, to dispense with the necessity of resort to this method of showing damages and to fix double the value of the package ordered to be returned, as a definite sum to be paid for the nonfulfillment of the statutory duty. In such cases the recovery is for the the stipulated sum, and is not limited to the damages actually proven. (*Clark* v. *Barnard*, 108 U. S. 436, 457.)

It is strongly urged that this in many cases may work serious hardship, and that in all the years in which this statute or its equivalent has been in force no action is shown to have been brought upon this theory. But the contract is definite in its terms, and it was the privilege of the importer to leave the goods in the custody of the Government or take them out upon giving the obligation which is the subject-matter of this suit. It may be that in some cases such a rule would permit the Government to recover a large percentage of the value of the goods imported, and it is suggested the package not returned may represent the larger part of the value of the

entire invoice, but we do not think these considerations should overcome the purposes of the statute and the terms of the obligation incurred in the giving of this bond.

The purpose of the statute was to enforce the collection of the revenues, and to require that goods shall be as represented, and if removed from governmental control before the facts about them are ascertained, to require them to be returned unopened, except as provided by statute, or a specific penalty be paid for failure so to do.

It is further contended that section 961, Rev. Stat. U. S. protects against enforcement of a penalty of this kind. This section provides: "In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." But if we are correct in holding that it was the intention of Congress to provide a specific penalty for failing to return the merchandise as required, it is not within the province of courts of equity to mitigate the harshness of penalties or forfeitures in such cases, for such relief would run directly counter to the statutory requirements. (Story, Eq. Jur. sec. 1326.) We think the Circuit Court was right in rendering judgment for double the value of the unreturned package.

The judgment of the Circuit Court of Appeals will be reversed and the judgment of the Circuit Court affirmed and the case remanded to the Circuit Court.

Mr. Justice BREWER took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.